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THE BRITISH YEAR BOOK OF
INTERNATIONAL LAW

THE
BRITISH YEAR BOOK OF
INTERNATIONAL LAW
1986

FIFTY-SEVENTH YEAR OF ISSUE

OXFORD
AT THE CLARENDON PRESS

1987

x21 151 v. 5 1 1106
Oxford University Press, Walton Street, Oxford OX2 6DP
Oxford New York Toronto
Delhi Bombay Calcutta Madras Karachi
Petaling Jaya Singapore Hong Kong Tokyo
Nairobi Dar es Salaam Cape Town
Melbourne Auckland
and associated companies in
Beirut Berlin Ibadan Nicosia

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The British Year Book of International Law is an annual publication, starting with Volume 52 (1981). Orders for subscriptions or for individual volumes can be placed through a bookseller or subscription agent. In case of difficulty please write to the Retail Services Dept., Oxford University Press Distribution Services, Saxon Way West, Corby, Northants NN18 9ES, UK

British Library Cataloguing in Publication Data

The British year book of international law.
1986: fifty-seventh year of international law
1. International law—Periodicals
341'.05 JX1
ISBN 0-19-825604-3

Printed in Great Britain
at the University Printing House, Oxford
by David Stanford
Printer to the University

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Editorial Communications should be addressed as follows:

Articles and Notes:

PROFESSOR IAN BROWNLIE
All Souls College, Oxford, OX1 4AL.

Books for Review:

PROFESSOR D. W. BOWETT
Queens' College, Cambridge, CB3 9ET.

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CONTRACTS IN ENGLISH PRIVATE INTERNATIONAL LAW*

By P. B. CARTER¹

THIS article is primarily a commentary upon the way in which various problems of choice of law relating to transnational commercial contracts generally are dealt with in the English courts. Choice of law and jurisdiction cannot, however, be sensibly treated in complete isolation from each other in this area. First, therefore, something should be said about the latter—partly because often in practice the problem of identifying the applicable or ‘proper’ law arises in a jurisdictional context. This tendency is largely due to the fact that one of the grounds upon which leave may be sought in an action on contract to serve a defendant, who is outside the jurisdiction, is that the contract ‘is by its terms, or by implication, governed by English law’.² Moreover, although it has been established that a choice of jurisdiction clause in a contract, that is to say a clause providing that any dispute between the parties is to be referred to the exclusive jurisdiction of a particular court, does not always denote as well choice of the application of its law,³ it will very often be treated as being strongly indicative of this.⁴ Also, a question can arise as to the circumstances in which such a clause, although valid, may nevertheless be disregarded. The issue of its validity is then a matter to be decided by reference to the law which would be the applicable or ‘proper’ law.⁵ Of course the clause, to be effective, must also not contravene any statutory prohibition against the ousting of the jurisdiction of the English court, which statutory prohibition either by its terms or by established principles of interpretation applies to the contract. Finally, in the various jurisdictional contexts in which a court is called upon to exercise a discretion, the identity of the applicable law will often be a factor to which regard may, or should, be had.

I

The general common law rule regulating the assumption of jurisdiction by an English court to entertain any action *in personam* requires that the

* © P. B. Carter, 1987.

¹ Barrister and Honorary Bencher of the Middle Temple; Fellow of Wadham College, Oxford.

² RSC, Ord. 11, r. 1 (1) (d) (iii), formerly r. 1 (1) (f) (iii).

³ *Compagnie Tunisienne de Navigation SA v. Compagnie d'Armement Maritime SA*, [1971] AC 572.

⁴ See, e.g., Lloyd J in *Atlantic Underwriting Agencies Ltd. v. Compagnia di Assicurazione di Milano SpA*, [1979] 2 Lloyd's Rep. 240.

⁵ For a neat illustration of this see the judgment of Bingham J in *Dubai Electricity Co. v. Islamic Republic of Iran Shipping Lines*, [1984] 2 Lloyd's Rep. 380.

defendant be served personally⁶ within the law district constituted by England and Wales with a writ or originating summons, or that he submit to the jurisdiction of the court. The rigidity of the common law position was first very substantially modified by the Common Law Procedure Act 1852, and there are now many situations in which leave may be sought to serve process upon a defendant abroad even though he has not submitted to the court's jurisdiction. The principal sets of circumstances in which the court, on leave being sought, has the discretionary power to allow such service are set out in the Rules of the Supreme Court, Order 11, Rule 1. These include important circumstances of general scope, such as that the person against whom relief is sought is domiciled within the jurisdiction.⁷ Without prejudice to this generality Rule 1 (1) (d) and (e) (formerly Rule 1 (1) (f) and (g) and Rule 2) of Order 11 set out circumstances in which leave may be sought in contract cases.⁸ Rule 1 (1) (d) permits a court to grant leave if the contract '(i) was made within the jurisdiction, or (ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or (iii) is by its terms, or by implication, governed by English law, or (iv) contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of the contract'. Lord Wilberforce has recently reaffirmed that the formula used in paragraph (d) (iii) above is equivalent to a requirement that the proper law of the contract should be English law. This involves treating the words 'by implication' as covering both the situation where the parties' mutual intention can be inferred and the situation where, no such inference being possible, it is necessary to seek the system of law with which the contract has its closest and most real connection.⁹ Rule 1 (1) (e) permits the grant of leave if the action is 'in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction'.

Consequent upon the coming into force on 1 January 1987 of the Civil Jurisdiction and Judgments Act 1982¹⁰ the position relating to jurisdiction

⁶ A company registered in England is now deemed to be present by virtue of its incorporation. A company registered in Scotland carrying on business in England may be served at its principal place of business in England. A similar general principle, although the rules are more complex, applies in the case of a foreign corporation.

⁷ RSC, Ord. 11, r. 1 (1) (a), formerly r. 1 (1) (c). Domicile in this context means domicile as defined in the Civil Jurisdiction and Judgments Act 1982, Part V: see below.

⁸ See, too, Rule 1 (1) (g), formerly Rule 1 (1) (b), in which additional provision is made in relation to land situated within the jurisdiction.

⁹ *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.*, [1984] AC 50, 69.

¹⁰ This Act *inter alia* brings into force the rules of jurisdiction provided for in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as amended by the 1978 Accession Convention. For a detailed analysis of the provisions and effects of this Act, see Collins, *The Civil Jurisdiction and Judgments Act 1982* (1983).

has been radically changed in cases coming within its scope in point of subject-matter and, in particular, in cases in which the defendant is 'domiciled' in a Contracting State.¹¹ In respect of matters coming within the scope of the Brussels Convention, although the English court now has jurisdiction as of right on the basis of the domicile of the defendant, it is generally precluded from taking jurisdiction in respect of such matters if the defendant is domiciled in another Contracting State.¹² In this context 'domicile' for the purposes of the laws of the United Kingdom broadly speaking denotes, in the case of an individual, residence which is characterized by a substantial connection,¹³ and in the case of a corporate defendant, incorporation or place of central management or control.¹⁴

It can be seen that, although jurisdiction will be restricted in cases which fall within the terms of the Civil Jurisdiction and Judgments Act, generally speaking an English court's assumption of jurisdiction in contract actions can be wide-ranging.¹⁵ However, two important limitations upon the actual assumption of jurisdiction in practice are to be noted.

First, although in cases in which a defendant has been served with process within the jurisdiction or in which he has submitted to the jurisdiction, the plaintiff is entitled as of right to demand that jurisdiction be taken, the defendant may in appropriate circumstances seek a stay of the proceedings. As a result of striking developments that have taken place in the course of little more than a decade the task facing a defendant, who seeks a stay of the proceedings of a jurisdictionally competent English court, is markedly less daunting than it was previously. Three of the four landmark House of Lords cases¹⁶ in this development were not in fact contract actions *in personam*, but there can be little doubt that their liberalizing effect is general. In *MacShannon v. Rockware Glass Ltd.* Lord Diplock said:

In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.¹⁷

It has subsequently become clear that the onus of proof is upon the

¹¹ At the time of writing, the Contracting States are all the European Community States except Eire, Spain, Portugal and Greece.

¹² Exceptional cases in which by virtue of Article 16 of the Convention courts will have exclusive jurisdiction regardless of domicile will seldom be relevant in contract actions.

¹³ Section 41.

¹⁴ Section 42.

¹⁵ The revised Ord. 11, r. 1 (1), omits the previous provisions for defendants domiciled or ordinarily resident in Scotland or Northern Ireland as they are covered by Schedule 4 to the 1982 Act.

¹⁶ *The Atlantic Star*, [1974] AC 436; *MacShannon v. Rockware Glass Ltd.*, [1978] AC 795; *The Abidin Daver*, [1984] AC 398; *Spiliada Maritime Corporation v. Cansulex Ltd.*, [1986] 3 WLR 972.

¹⁷ [1978] AC 795, 812. For comments on the most recent of the four landmark cases, *Spiliada Maritime Corporation v. Cansulex Ltd.*, [1986] 3 WLR 972, see 'Decisions of British Courts during 1985-6', pp. 429 ff. below.

plaintiff so far as the latter requirement is concerned. The burden is initially upon the defendant seeking to avoid suit in England and it is still a heavy one; but, if he discharges it, and if then the plaintiff is unable to discharge the burden which consequently falls upon him, or, the plaintiff having discharged that burden, the court in its discretion resolves the balance of conflicting interests in the defendant's favour, the English proceedings will be stayed.

Secondly, it is to be remembered that the availability of leave to serve an absent defendant is never (except in a few specific statutory cases) available as of right.¹⁸ It has been emphasized that the plaintiff seeking leave 'must show that the case comes clearly within one of the heads of R.S.C., O. 11; and further that the case comes not merely within the letter but also within the spirit of the rule'.¹⁹ Moreover, as the application for leave is made *ex parte* he should make a full and fair disclosure of all relevant facts, and he must show that he has a good arguable case on the merits. The effect of satisfaction of these requirements is no more than to ground the court's discretion to allow service upon the absent defendant; and, as has been frequently emphasized, caution is to be exercised before granting leave.

These manifestations of jurisdictional restraint are to some extent to be contrasted with the way in which, at least until recently, and at least in practice, English courts have sometimes allowed the institution of proceedings in England in breach of contractual foreign exclusive jurisdiction clauses. The burden upon a plaintiff who seeks to bring an action in England on a contract, one of the terms of which is that all disputes between the parties arising out of that contract are to be submitted to the exclusive jurisdiction of a foreign tribunal, has been said always to be a heavy one, and moreover to be especially heavy in the case of the plaintiff who is applying for leave to serve a foreign defendant abroad, as distinct from the plaintiff who is seeking to institute proceedings in England against a defendant who is present there. Nevertheless the matter is ultimately one of discretion.²⁰ Guidance in the exercise of this discretion is to be found in the oft-quoted words of Brandon J in *The Eleftheria*.²¹ His Lordship emphasized that 'the discretion [to stay the English proceedings] should be exercised by granting a stay unless strong cause for not doing so is shown'. It is submitted that considerations of the general appropriateness of a *forum* and of the convenience and expense of the parties, although often decisively relevant in more general contexts, should in this particular context always be seen against the additional factor that here the court is being asked to countenance, and indeed to

¹⁸ See RSC, Ord. 11, r. 4 (2).

¹⁹ *Atlantic Underwriting Agencies Ltd. v. Compagnie di Assicurazione di Milano SpA*, [1979] 2 Lloyd's Rep. 240, *per* Lloyd J at p. 245.

²⁰ It is to be noted, however, that by virtue of the Civil Jurisdiction and Judgments Act 1982, Article 17 of the Convention, which deals with exclusive jurisdiction clauses, removes the element of discretion in cases to which it applies.

²¹ [1970] P 94, 99.

facilitate, a deliberate breach of a term of a valid contract. There is room for the view that English courts have in the past sometimes been too ready to discover a 'strong cause' for refusing to stay proceedings brought in breach of a foreign exclusive jurisdiction clause.²² However, the decision of the Court of Appeal in *The El Amria and El Minia*²³ is perhaps indicative of a currently emerging approach. There a shipper agreed to carry onions from Egypt to Europe on two ships. This agreement contained no exclusive jurisdiction clause; but the bills of lading issued pursuant to it did incorporate such a clause in relation to the courts of Egypt. The cargo owner sued the shipper in England for damage to the cargo. At first instance the shipper was refused an application for a stay, but the Court of Appeal, allowing the defendant's appeal, granted a stay. In a sense the court had to prejudge the question of choice of law in that it referred to the law of Egypt in order to decide that the contract between the parties was embodied in the bills of lading and thus that the jurisdiction clause was operative.

An important aspect of the interaction of jurisdiction and choice of law is to be seen in three jurisdictional contexts in which the court is called upon to exercise a discretion. First, when exercising its general discretion to stay English proceedings in accordance with the principles which have emerged in the *MacShannon v. Rockware Glass Ltd.*²⁴ line of cases referred to above, the identity of the proper law can be a factor—occasionally it seems an important factor—to be taken into account. For example in *The Hidi Maru*²⁵ this factor—there that the applicable law was English law—seems to have played a major role in leading the Court of Appeal to the conclusion that English proceedings should not be stayed even though most other relevant factors pointed clearly to Kuwait. Secondly, when a court is considering whether to grant leave to serve an absent defendant, the likelihood of an English court, if jurisdiction is taken, applying English law may influence the court in exercising its discretion. In a contract action, therefore, the fact that English law would be the *lex causae* is not only a circumstance that by virtue of Order 11, Rule 1 (1) (d) (iii), grounds the power to grant leave, but it can also operate as a factor making for the exercise of that power. Thirdly, Brandon J in *The Eleftheria*,²⁶ when listing factors which a court should particularly take into account when considering whether 'strong cause' had been made out to allow proceedings in England in breach of a foreign exclusive jurisdiction clause, included 'Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects'.²⁷

²² See, e.g., *The Fehmarn*, [1958] 1 WLR 159, and *The Vishra Prabha*, [1979] 2 Lloyd's Rep. 286; but contrast *Trendtex Trading Corporation v. Crédit Suisse*, [1982] AC 679; *The Kislovodsk*, [1980] 1 Lloyd's Rep. 183; *The Star of Luxor*, [1981] 1 Lloyd's Rep. 139; *The Biskra*, [1983] 2 Lloyd's Rep 59; *The Sennar (No. 2)*, [1985] 1 WLR 490.

²³ [1982] 2 Lloyd's Rep. 28.

²⁵ [1981] 2 Lloyd's Rep. 511.

²⁷ [1970] P 94, 100.

²⁴ [1978] AC 795.

²⁶ [1970] P 94. See above.

In almost every branch of private international law it is only in a crudely formalistic sense that questions of jurisdiction and questions of choice of law are to be regarded as being totally separate. Their interaction in the English private international law relating to commercial contracts is particularly marked. That this is so stems largely from the nature of the circumstances in which an English court may, and in practice will, take jurisdiction to determine contractual issues. This makes it important to realize that, when considering and assessing the merits of the choice of law rule in this branch of private international law, one is considering and assessing, not only the appropriateness of the application of the law indicated by that choice of law rule by a jurisdictionally competent court, but also in significant measure the appropriateness of its influence on the question of the court's jurisdictional competence.

II

The formulation of choice of law rules of *general* applicability to contracts in transnational fact situations must unavoidably be especially difficult. The main reasons for this are several. First, the concept of contract is itself broad and loose. Economically and otherwise it is a concept that embraces a wide and diverse range of transactions. In this it can be contrasted with, for example, the concept of marriage or that of succession to immovable property. Secondly, the legal issues to which contract litigation can give rise differ widely in category and in character: most systems of domestic law provide for many differing forms of relief in such cases. Thirdly, there is an exceptionally wide range of possible geographic spread. That is to say, there may be many potential or possible connecting factors in a single fact situation: the nationalities, domicils and residences of the parties (of whom there may be several), their places of business (which may be several), the place in which the contract was made, the place or places of contemplated performance, the place of alleged breach, the use of the form and legal terminology of a particular country, the fact that the parties have evinced an intention that any dispute arising out of the contract is to be determined by the courts of a particular country and/or that the law of a particular country should determine the rights and obligations of the parties, the *locus* of the subject-matter of the contract, etc. Again, this contrasts with, for example, a case of marriage, where the only obviously possible connecting factors are the place of celebration and the pre-marriage, or intended or actual post-marriage, nationalities, domicils or residences of the two parties; or with a problem of succession to immovables where the only obviously possible connecting factors could be the *situs* and the nationality, domicil or residence of the deceased.

Two alternative lines of approach could be taken to the attempted accommodation of these various diversities. One would involve the formulation of a detailed and complex pattern of choice of law rules. The

other would take the form of one single, but highly flexible, rule. Various forms of compromise between these two approaches could be possible, but the English common law, and indeed most legal systems, have adopted the latter general approach. A limited number of specialized (but important) classes of contract are accorded individual treatment. For example, a contract for the carriage of persons or of goods by land, sea or air, which is within the scope of a relevant international convention on transport, will be governed by the provisions of that convention in so far as they have been incorporated into English law; or, again, transnational questions relating to bills of exchange or promissory notes must be determined in accordance with the Bills of Exchange Act 1882 to the extent that it is applicable.²⁸ But, these special categories of contract apart, the response of the common law to the problem of choice of law has basically been in terms of a generally applicable law—generally applicable in the sense that it applies to most types of contract and in the sense that it applies to most types of contractual issue. This pre-eminent governing law is dubbed in common law jurisdictions ‘the proper law’ of the contract. It is what is referred to in the EEC Convention on the Law Applicable to Contractual Obligations as ‘the applicable law’.²⁹ It is the law that is generally dominant, but it can be modified, supplemented or dethroned as it applies to different aspects of the contract. A threshold and fundamental question is as to how the proper law of a contract is to be determined. The other basic question is as to the extent of its role: in other words the question as to what part is to be played by laws other than the proper law.

III

Dicey and Morris in Rule 180 define the proper law of a contract as ‘the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection’.³⁰ It is clear that initial focus is upon the implementation of the intention of the parties. Historically this largely derives from the words of Willes J pronounced in the Court of Exchequer Chamber in 1865 in *Lloyd v. Guibert*: ‘it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter . . .’.³¹ In these oft-quoted words lie the seeds of two pregnant ambiguities. One is as to the import of the words ‘or rather’. Is what follows these words to be seen as an improved reformulation of

²⁸ For the position relating to international sales of goods, see the UN Convention on Contracts for the International Sale of Goods (1980), should the UK subscribe to it.

²⁹ See, e.g., Article 10 of the Convention.

³⁰ *The Conflict of Laws* (11th edn., 1987), pp. 1161–2.

³¹ (1865) LR 1 QB 115, 120–1.

what has preceded them? Or do they introduce a different rule to which resort is to be had only in the case in which it is impossible to discover the intention (if any) of the parties? The other ambiguity is as to the meaning of the phrase 'it is just to presume': does this refer only to the situation in which the parties' intention, although not expressed, can nevertheless be realistically deduced from the circumstances, or does it refer more widely to a power (or duty) on the part of the court to impute to the parties an intention to make a choice in accordance with some external criteria of justice?

In 1896 Dicey wrote in the first edition of his treatise that '... the term "proper law of a contract" means the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves'.³² 'Or rather' was replaced by 'or', and 'is just to presume' was replaced by 'may fairly be presumed': but the basic ambiguities remained. Regarded more generally this original *Dicey* formulation, like that of Willes J, is entirely in terms of the intention of the parties, express, implied or imputed. To the extent that it purports to denote actual intention it clearly embodies a fiction in cases in which no actual intention can realistically, or perhaps even plausibly, be inferred from the circumstances. In the current *Dicey and Morris* formulation this fiction has been jettisoned: where the intention of the parties 'is neither expressed nor to be inferred from the circumstances' resort is had to 'the system of law with which the transaction has its closest and most real connection'.³³ Moreover, the current *Dicey and Morris* formulation appears to resolve both the ambiguities inherent in their original source, the words of Willes J in *Lloyd v. Guibert*, once castigated by the late Dr Cheshire as *fons et origo mali*.³⁴ The second part of the Willes proposition is not treated as a reformulation of the first part, but as merely denoting a fall-back position. What emerges then is a rule of first resort in terms of the actual intention of the parties. Again, the elimination of any reference to what it is 'just to presume' would seem to preclude explicit reference to external criteria of justice or fairness. The substituted fall-back position is in factual terms of 'closest and most real connection'.

The progeny of the doubly ambiguous words of Willes J is a rule which (1) appears to confer upon parties to a contract an unfettered freedom to choose the governing law, but which (2) in the absence of a discernible express or implied (but actual) exercise of that choice, provides for resort to a purely 'objectively' determined proper law.

Lord Wilberforce, in the course of his judgment in the recent case of *Amin Rasheed Corporation v. Kuwait Insurance Co.*,³⁵ having differentiated

³² Dicey, *Conflict of Laws*, Rule 143.

³³ Dicey and Morris, *The Conflict of Laws* (11th edn., 1987), Rule 180.

³⁴ Cheshire, *International Contracts* (Glasgow, 1948). ³⁵ [1984] AC 50.

between cases where the parties' 'mutual intention can be inferred' and cases where 'no such inference being possible, it is necessary to seek the system of law with which the contract has its closest and most real connection', observed that 'these situations merge into each other'.³⁶ It is suggested with respect that conceptually they clearly do not merge into each other, but that in practice they may often appear to do so. The explanation of this latter is largely twofold. First, the determination of the fact of intention (let alone a commonly held intention) is notoriously difficult. It has to be achieved by assessing the significance of external phenomena, and this is unavoidably a subjective process, different judges reaching differing conclusions concerning the same facts. For instance in *Whitworth Street Estates Ltd. v. Miller*³⁷ Lord Hodson said: 'the question is, to my mind, determined by the use of the English language, the selection of which shows the intention of the parties to be bound by English law'.³⁸ So, too, Lord Dilhorne said: 'in my opinion, the conduct of the parties at the time the contract was entered into shows that despite the fact that the work was to be done in Scotland both parties intended that the contract should be governed by the law of England'.³⁹ On the other hand, Lord Guest, who, like Lords Hodson and Dilhorne, reached the conclusion that the proper law was English law, did so although he had 'no doubt that the parties never chose English law as the proper law of the contract or evinced any intention to be bound by this law'.⁴⁰ So, too, Lord Reid could not 'find any agreement as to what should be the proper law of the contract'.⁴¹ The second reason underlying the tendency of these two conceptually separate situations to appear to merge in practice is to be found in some uncertainty as to the object of the intention being sought in the former situation, and in some uncertainty as to the object of the 'connection' in the latter situation. The former of these doubts would be resolved if one were to accept (as is in fact implicit in Lord Wilberforce's judgment in *Amin Rasheed Corporation v. Kuwait Insurance Co.*)⁴² that in the search for the parties' intention, the focus must be upon their intention with regard to the formation and validity of their contract and only incidentally (although sometimes importantly) with regard to matters of interpretation or construction of the words and legal terminology used. The later source of uncertainty crystallizes into the question as to whether what has to be identified is the closest and most real connection with a legal system or the closest and most real connection with a country (or fact situation). Reference will be made to these two problems in broader contexts later in this article.

The 'two tier' approach to the methodology of determination of the

³⁶ Ibid. 69.

³⁷ [1970] AC 583; see, too, *Compagnie Tunisienne de Navigation SA v. Compagnie d'Armement Maritime SA*, [1971] AC 572.

³⁸ [1970] AC 583, 606.

³⁹ Ibid. 611.

⁴⁰ Ibid. 607-8.

⁴¹ Ibid. 603.

⁴² Ibid., and see below.

proper law, implicit in the current *Dicey and Morris* formulation and generally accepted in contemporary English private international law, may be seen as provoking two questions of basic policy. First, ought parties to a commercial contract to be allowed an unfettered freedom to choose the governing law and what ought the nature of that choice to be? Secondly, if effect is not, or cannot, be given to the parties' choice, what law ought then to govern?

An English court will not, of course, apply a foreign law, even if its application is indicated by the parties' choice, if such application would be contrary to public policy as understood in private international law.⁴³ Nor will a foreign law be applied to the extent that this would involve contravention of an English statute, which by its terms or by established principles of interpretation would be otherwise applicable. The range of a statute's operation will, in the absence of clear indications to the contrary, be assumed to be limited to domestic law. However, exceptionally a statute may by its terms have some private international law effect.⁴⁴ Sometimes the statute may, indeed, spell out in some detail and complexity the extent to which it operates so as to dethrone private international law doctrine. An example of this latter is provided by section 27 of the Unfair Contract Terms Act 1977. The general purpose of that Act is to lay down a set of controls over exemption clauses in many types of contract in English domestic law. Section 27 (1), however, provides that

Where the proper law of a contract is the law of any part of the United Kingdom only by choice of the parties (and apart from that choice would be the law of some country outside the United Kingdom) [the controls of] this Act do not operate as part of the proper law.

Conversely section 27 (2) provides:

This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both)—(a) the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act; or (b) in making the contract one or more of the

⁴³ For example, a contract for the sale of slaves would not be enforced in England even if valid by the proper law chosen by the parties. On the scope of public policy in private international law generally, see this *Year Book*, 55 (1984), pp. 111, 122–31. See, too, the EEC Convention on the Law Applicable to Contractual Obligations, Article 16: 'The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.'

⁴⁴ See, e.g., the Law Reform (Miscellaneous Provisions) Act 1970, section 1 (1): 'An agreement between two persons to marry one another shall not under the law of England and Wales have effect as a contract giving rise to legal rights and no action shall lie in England and Wales for breach of such an agreement *whatever the law applicable to the agreement*' (italics supplied).

See, too, the EEC Convention on the Law Applicable to Contractual Obligations, Article 7 (2): 'Nothing in this Convention shall restrict the application of the rules of the law of a forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.'

parties dealt as a consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.

In some other instances, even in the absence of an explicit provision of this sort, a statute will be construed so as to limit the operation of the proper law of a contract and thus limit the parties' freedom to choose. The Schedule to the Carriage of Goods by Sea Act 1971 sets out the Hague-Visby Rules relating to the carriage of goods by sea. Section 1 (2) of the Act provides that these Rules as set out in the Schedule 'shall have the force of law'. In *The Hollandia*⁴⁵ the House of Lords held that this made the Rules applicable to a contract the proper law of which, as chosen by the parties, was Dutch law.

Limitations upon the freedom of the parties to choose the governing law imposed by considerations of public policy or by the overriding effect of a statute are, of course, merely particular manifestations of the impact of principles of *forum* control operating throughout the whole of private international law. Such limitations apart, should parties to a commercial contract be completely free to choose the law governing the formation, validity and/or interpretation of their contract? Doubt and controversy as to the correct answer to this question must in some measure reflect deep-seated differences of economic and political philosophy. Contract is essentially consensual; contractual obligations are voluntarily undertaken; why should the parties not be free to agree upon the law which will create and define those obligations? On the other hand, why should parties be permitted to evade the rules of the 'naturally' applicable legal system? More specifically, why should they be allowed greater freedom in this regard merely because there is a foreign element in the fact situation? If facts are purely domestic to a *forum* parties will not be allowed to evade a mandatory rule of its law by the simple expedient of indicating that some more generous foreign law should govern their contract. Why should the mere circumstance that, for example, the contract was signed in country X confer upon the parties a freedom to select the law of any country in the world as the governing law?

So far as English case law is concerned there can be no doubt that, at least at the verbal level, the parties to a contract do have very great, indeed sometimes it would appear (public policy and statutory control apart) virtually unlimited, freedom of choice. It is only necessary to cite three relatively recent House of Lords cases, *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.*,⁴⁶ *Compagnie Tunisienne de Navigation SA v. Compagnie d'Armement Maritime SA*⁴⁷ and *Amin Rasheed Corporation v. Kuwait Insurance*,⁴⁸ in order to illustrate this. In the first of these cases Lord Reid said:

⁴⁵ [1983] 1 AC 565.

⁴⁶ [1970] AC 583.

⁴⁷ [1971] AC 572.

⁴⁸ [1984] AC 50.

The general principle is not in doubt. Parties are entitled to agree what is to be the proper law of their contract, and if they do not make any such agreement then the law will determine what is the proper law. There have been from time to time suggestions that parties ought not to be so entitled, but in my view there is no doubt that they are entitled to make such an agreement, and I see no good reason why, subject it may be to some limitations, they should not be so entitled. But it must be a contractual agreement. It need not be in express words. Like any other agreement it may be inferred from reading their contract as a whole in [the] light of relevant circumstances known to both parties when they made their contract. The question is not what the parties thought or intended but what they agreed.⁴⁹

In the *Compagnie d'Armement Maritime* case Lord Morris (who had not sat in the *Whitworth Street Estates* case) said:

The general rule is that the proper law of a contract is that law by which the parties intended that their rights should be determined . . . Parties may agree, either in express terms or in terms which can be inferred, to submit themselves to a particular system of law.⁵⁰

In the *Amin Rasheed Corporation* case Lord Diplock cited with approval the words of Lord Atkin uttered nearly half a century earlier in *R v. International Trustee for the Protection of Bondholders Aktiengesellschaft*:

The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances.⁵¹

In all three cases all their Lordships either asserted or assumed that the basic rule is that effect is to be given to any choice (express or implied) by the parties of the law to govern their contract.

However, such consistent judicial unanimity as to the basic principle of party autonomy notwithstanding, there is still, it is submitted, room for doubt as to whether this autonomy is absolute.

First, it is to be noted that in the *Whitworth Street Estates* case Lord Reid did concede (although without elaboration) that the parties' entitlement to choose is 'subject it may be to some limitations'. Again, in the *Compagnie d'Armement Maritime* case Lord Morris referred to a 'general' rule enabling the parties to choose. In a previous Court of Appeal case, *Mackender v. Feldia*,⁵² Diplock LJ had referred to it as a 'prima facie' rule. Much earlier in *Vita Food Products Inc. v. Unus Shipping Co.*⁵³ Lord Wright, giving the opinion of the Privy Council, an opinion once regarded

⁴⁹ [1970] AC 583, 603.

⁵⁰ [1971] AC 572, 587.

⁵¹ [1937] AC 500, 529, cited by Lord Diplock [1984] AC 50, 61.

⁵² [1967] 2 QB 590, 602.

⁵³ [1939] AC 277.

as the *locus classicus* on the subject, while asserting in otherwise sweeping terms the autonomy of the parties, it being 'difficult to see what qualifications are possible', added 'provided the intention expressed is *bona fide* and legal . . .'.⁵⁴ Whereas the requirement of *bona fides* may be seen as doing no more than emphasizing that the parties' expression of intention must be genuine, that of legality would seem to indicate a real (and, indeed, question-begging) qualification.

Secondly, many judicial pronouncements, although apparently unqualified on their face, must be seen in their respective contexts.

In the *Whitworth Street Estates* case the facts were connected with England and with Scotland and had no connection with any other country. The contract contained no choice of law clause. Had there been such a clause indicating English law or Scots law as the governing law, there can be no doubt that effect would have been unanimously given to that clause. It is, however, scarcely credible that effect would automatically have been given to a clause indicating the applicability of the law of some third country totally unconnected with the fact situation—at least in the absence of some very strong reason. It is true that what was said, and to some extent what was decided, in the *Vita Foods* case would suggest the contrary. There a Nova Scotia company carrying on business in Nova Scotia issued in Newfoundland bills of lading for the carriage of a cargo from Newfoundland to New York. The bills did not incorporate the Hague Rules as mandatorily required by the law of Newfoundland. The bills did, however, contain a statement to the effect that 'this contract shall be governed by English law'. The vessel was wrecked off the coast of Nova Scotia. An action was brought in Nova Scotia against the shipowners for failure to deliver the cargo in New York in like condition as received on board. The Privy Council, applying English law, held the defendants to be not liable. Lord Wright, in the course of delivering the opinion of the Board, said: 'connection with English law is not, as a matter of principle, essential'. It is, however, to be observed that (as the Supreme Court of Nova Scotia had in fact held) the defendants would not in the circumstances have been liable under the Hague Rules, i.e. under the law of Newfoundland with which the contract had its closest and most real connection. The *actual result* of the Privy Council holding, therefore, did not involve a contravention of a mandatory rule of Newfoundland law. There is certainly room for the conjecture that had the defendants been liable under that law, cavalier avoidance of its mandatory rule might not have been countenanced.⁵⁵ The

⁵⁴ Ibid. 290.

⁵⁵ In the *Vita Foods* case the Privy Council was constrained to disapprove the earlier Court of Appeal decision in *The Torni*, [1932] P 78. There the facts had been very similar. A contract had been made in what was then the Mandated Territory of Palestine for the carriage of a cargo from Palestine to England. The contract provided that it should be 'construed according to English law', a Palestinian Ordinance requiring incorporation of the Hague Rules being disregarded. Although the *forum* was England (whereas in the *Vita Foods* case the Privy Council was notionally sitting in Nova Scotia) and although there was a factual connection with England (whereas in the *Vita Foods* case there was not), effect was not given to the selection of English law.

contract which was the subject-matter of the *Whitworth Street Estates* case in fact contained no choice of law clause. In these circumstances a majority (Lords Hodson, Dilhorne and Guest) held that the proper law was English law, the minority (Lords Reid and Wilberforce) taking the view that it was Scots law. What is interesting, as has already been pointed out, is that two members of the majority, Lords Hodson and Dilhorne, were able to detect an intention by the parties that English law should govern, whereas the third member of the majority was unable to detect any such intention but took the view that on balance the contract was more closely connected with England than with Scotland.⁵⁶

In *Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA* a Tunisian company had negotiated a contract with French shipowners in Paris for the transport of crude oil from one Tunisian port to another. The printed tanker voyage charter was in standard English form and language and had some typed clauses added. Clause 13 of the printed form provided that 'This contract shall be governed by the laws of the flag of the vessel carrying the goods . . .'. Clause 18 provided that any disputes were to be settled by arbitrators in London. Disputes did arise, and in subsequent arbitration proceedings in London the arbitrator found *inter alia* that both parties had contemplated at the time the contract was entered into that vessels owned by the French shipowners would be used 'at least primarily to perform the contract, but that in the event ships flying the flags of six different countries had been used'. The House of Lords unanimously held that French law was the proper law of the contract. There was apparently no suggestion at any stage that the governing law should be any law other than that of England or France. Although all the Law Lords accepted the twin principles of the parties' freedom of choice, and of resort to an objective test only in default of choice, there must, as in the *Whitworth Street Estates* case, be room for legitimate doubt as to whether effect would have been given to a choice by the parties of the law of some third country totally unconnected with the contract.

Although their Lordships all agreed that French law was the proper law, there was a divergence of view (similar to that amongst the majority in the *Whitworth Street* case)⁵⁷ as to the reasons for their conclusion. Three of their Lordships (Lord Morris, Lord Dilhorne and Lord Diplock) took the view that clause 13 indicated a choice by the parties of French law as the proper law, whereas Lords Reid and Wilberforce, taking a contrary view, nevertheless found the contract most closely connected with France.

An important specific feature of the decision is that it disposed of the

⁵⁶ Strictly speaking their Lordships' observations in *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* concerning the determination of the proper law must probably be regarded as *obiter*. The actual issue was as to the curial law of an arbitration, and their Lordships held unanimously that, whatever the proper law, that was the law of Scotland. It would, however, be pedantic indeed to see this as detracting from the importance of those observations.

⁵⁷ Above, p. 9.

notion that a contractual choice of *forum* for arbitration always amounts to a choice of the proper law of the contract. Lord Reid said: 'it would, in my view, be highly anomalous if our law required the mere fact that arbitration is to take place in England to be decisive as to the proper law of the contract'.⁵⁸

In *Amin Rasheed Corporation v. Kuwait Insurance Co.* the determination of the proper law arose in a jurisdictional context. Leave was being sought to serve defendants abroad under Order 11, Rule 1, of the Rules of the Supreme Court. In order to ground the discretion of the court to grant leave it was in the circumstances necessary to show that the contract was, 'by its terms or by implication, governed by English law'.⁵⁹ The plaintiffs, a Liberian corporation, owned a cargo vessel which they insured against war and marine risks with the defendants, a Kuwaiti insurance company. The form of the policy was based upon the Lloyd's standard form of marine policy with various modifications. It gave Kuwait as the place of issue and provided for claims to be payable there. It did not contain a choice of law clause. The vessel was detained by the Saudi Arabian authorities, and the master and crew were imprisoned for several months, seemingly in connection with a claim (denied by the plaintiffs) that the vessel had been involved in an attempt to smuggle oil. The plaintiffs sought to bring an action in England for total constructive loss of the ship under the policy. The trial judge, Bingham J, held that the contract was governed by Kuwaiti law and that accordingly there was no jurisdiction to allow service abroad. The learned judge further intimated that if, contrary to his view, the plaintiff's claim did fall within RSC Order 11, he would have exercised his discretion against allowing service. The plaintiff's appeal was dismissed by a divided Court of Appeal. On further appeal the House of Lords unanimously held, but for differing reasons, that the proper law of the contract was not Kuwaiti, but English, law. The House, however, dismissed the plaintiff's appeal, holding that the court's discretion under Order 11 should be exercised in the way indicated by Bingham J, namely in favour of the defendants. In reaching the conclusion that the proper law was English law four of their Lordships (Lord Diplock, with whom Lords Roskill, Brandon of Oakbrook and Brightman agreed) did so because, in the words of Lord Diplock, the provisions of the contract 'taken as a whole' pointed 'by necessary implication . . . ineluctably to the conclusion that the intention of the parties was that their mutual rights and obligations under it should be determined in accordance with the English law of marine insurance'.⁶⁰ In contrast Lord Wilberforce found 'no basis for inferring, as between the parties to this contract, an

⁵⁸ [1971] AC 572, 584. Choice of *forum* will, however, often be a significant factor when seeking the parties' intention. In *Atlantic Underwriting Agencies Ltd. v. Compagnia di Assicurazione di Milano SpA*, [1979] 2 Lloyd's Rep. 240, Lloyd J said that a clause indicating a choice of arbitral *forum*, although 'no longer conclusive, is still a very strong factor particularly in contracts between the nationals of different states' in determining choice of law.

⁵⁹ RSC, Ord. 11, r. 1 (1) (f) (iii), now r. 1 (1) (d) (iii); see p. 2 above.

⁶⁰ [1984] AC 50, 62.

intention that the contract should be governed either by English law or by the law of Kuwait'.⁶¹ His Lordship therefore held that 'What has to be done is to look carefully at all those factors normally regarded as relevant when the proper law is being searched for, including of course the nature of the policy itself, and to form a judgment as to the system of law with which that policy in the circumstances has the closest and most real connection'.⁶² Lord Wilberforce then 'with no great confidence . . . reached the conclusion that English law is the proper law of this particular contract'.⁶³ The judgments display two general features markedly similar to features correspondingly displayed in the *Whitworth Street Estates* and the *Compagnie Tunisienne de Navigation SA* cases. First, the highly subjective nature of investigation of the parties' intention was again demonstrated. Secondly, the largely unqualified assertion or assumption of the parties' freedom to choose the governing law was repeated: but, again, this was in a context of the possible applicability of only two laws (here English and Kuwaiti), each being of countries significantly connected with the contract.

There are three other features of the judgments in the *Amin Rasheed* case that merit comment.

First, Lord Diplock said of the proper law:

It is the substantive law of the country which the parties have chosen as that by which their mutual legally enforceable rights are to be ascertained, but excluding any *renvoi*, whether of remission or transmission, that the courts of that country might themselves apply if the matter were litigated before them.⁶⁴

This blanket rejection of *renvoi* contrasts with the curious and isolated *dictum* of Lord Wright in the *Vita Foods* case:

There is, in their Lordships' opinion, no ground for refusing to give effect to the express selection of English law as the proper law in the bills of lading. Hence English rules relating to the conflict of laws must be applied to determine how the bills of lading are affected by failure to comply with s. 3 of the Act.⁶⁵

This latter utterance of Lord Wright has long been regarded as inexplicable,⁶⁶ but Lord Diplock's a priori and unqualified rejection of *renvoi* in this area of private international law goes to the opposite extreme. The primary objective is to give effect to the intention of the parties, and in the great majority of cases it may indeed be presumed that, when they chose a governing law, what they had in mind was a system of domestic law. However, there could be a case in which parties clearly intended otherwise—namely, that their contract should be governed by the law which would be applied in the courts of the indicated country. Such a case is admittedly likely to be rare (although not fanciful, especially if the choice of law clause is combined with a choice of jurisdiction clause), but

⁶¹ [1984] AC 50, 69.

⁶² Ibid. 71.

⁶³ Ibid. 71-2.

⁶⁴ Ibid. 61-2.

⁶⁵ [1939] AC 277, 292.

⁶⁶ Falconbridge famously castigated it as a *lapsus calami*: *Selected Essays on the Conflict of Laws* (2nd edn., 1954), p. 404.

it is difficult to see why, if it were to occur, effect should not be given to the parties' intention. Indeed, the position would appear to be appropriately put in *Dicey and Morris*:

In the absence of strong evidence to the contrary, the parties must be deemed to have intended to refer to the domestic rules and not to the conflict rules of their chosen law, and connection with a given legal system is a connection with substantive legal principles, and not with conflict of laws rules.⁶⁷

Secondly, the concept of what has been called elsewhere the 'delocalized', 'internationalized' or 'transnational' contract is rejected. Lord Diplock said:

My Lords, contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations; and this must be so however widespread geographically the use of a contract employing a particular form of words to express the obligations assumed by the parties may be.⁶⁸

These are salutary words.⁶⁹ The proper law of a contract, however determined, must be an actual system of contract law, not some impressionistic transnational system.

Thirdly, Lord Wilberforce drew a distinction between matters of validity and matters of interpretation. A contract in a particular form may well fall to be interpreted according to the law to which that form pertains, without that law necessarily being the proper law of the contract. His Lordship said:

There is nothing unusual in a situation where, under the proper law of contract, resort is had to some other system of law for purposes of interpretation. In that case, that other system becomes a source of the law upon which the proper law may draw . . . the proper law is not applying a 'conflicts' rule (there may, in fact, be no foreign element in the case) but merely importing a foreign product for domestic use.⁷⁰

He continued:

. . . the Lloyd's SG form of a policy is taken into a great number of legal systems, sometimes by statute, as in Australia, sometimes as a matter of commercial practice, as in Belgium or Germany, or in the Arabian Gulf, and . . . in such cases, though their legal systems may, and on the evidence do, resort to English law in order to interpret its terms, the contract may be regarded as an Australian, Belgian, German etc. contract.⁷¹

⁶⁷ *The Conflict of Laws* (11th edn., 1987), p. 1164 (italics supplied). But contrast Article 15 of the EEC Convention on the Law Applicable to Contractual Obligations under which the exclusion of *renvoi* is unqualified.

⁶⁸ [1984] AC 50, 65.

⁶⁹ See Mann, *International and Comparative Law Quarterly*, 33 (1984), p. 193.

⁷⁰ [1984] AC 50, 69-70.

⁷¹ *Ibid.* 76.

Lord Wilberforce, as a consequence of emphasizing that the interpretation of a contract may be achieved by reference to the domestic rules of a system of law other than, but incorporated into, the proper law, attached less significance to the form and terminology of the contract when investigating the intention of the parties with regard to the proper law. In these circumstances he was unable on the facts of the instant case to discern any such intention. He, therefore, had to fall back upon a purely objective test. His Lordship did not, of course, deny that the form and terminology of a contract are factors to be taken into account when searching for the parties' intention as to the governing law; but their significance is obviously much reduced when it is accepted that matters of interpretation are not necessarily determined by reference to the proper law's own standards and that the search is for the law governing validity not interpretation *per se*.

The question can still be posed: are the constraints of public policy, as generally understood in private international law, and the requirements of particular *forum* statutes, the only limitations upon the freedom of the parties to a commercial contract to decide, either expressly or by implication, what law shall govern the transaction? The question can be posed, but in practice the answer will only be important in a case in which certain pre-conditions exist. First, the choice, although perhaps not expressed, must be clear and unambiguous. Secondly, the chosen law must be a law different from that which would be the law of the country of closest and most real connection, appropriate account having been taken of the factor of choice in identifying that law. For this condition to exist the chosen law will usually have to be the law of a country with little or no other connection with the transaction. Any significant connection, taken together with the fact of the parties' choice, will often make it the law of the country with which the transaction has the closest and most real connection. Thirdly, to give effect to the parties' choice must involve contravention of a mandatory rule of the otherwise applicable law. This condition is not fulfilled in a case in which incorporation by reference of the 'chosen' law is permitted by the otherwise applicable law. Fourthly, the inconsistency with the mandatory rule must lead to a different outcome of the proceedings. This was not the position in the *Vita Foods* case.⁷²

In the light of these pre-conditions it is not surprising that authority on the critical case is sparse. A rare case in which the above-mentioned conditions did exist was *The Torni*.⁷³ There the Hague Rules were held to be applicable notwithstanding a provision in the contract that it was 'to be construed in accordance with English law' and the fact that under English law the Rules would not have been applicable to the contract. Superficially this might be seen as a rejection of the parties' choice. The approach taken

⁷² [1939] AC 277; see p. 13 above.

⁷³ [1932] P 78.

by Scrutton LJ was, however, seemingly more sophisticated. He rejected any suggestion that the parties could by the simple device of choosing English law evade the mandatory rule of Palestinian law (the closest and most real connection being with Palestine) imposing the Hague Rules; but he held that the applicability of English law must be taken to be subject to the operation of those Rules. His Lordship sought to put this in terms of the interpretation of the particular clause, but the approach opens up wider possibilities. In the critical case (i.e. the case in which the above-mentioned pre-conditions exist) a rational and policy-orientated approach would often be, not to reject the parties' choice *in toto*, but to accept it subject to compliance with the mandatory requirement of the law of the country of closest and most real connection. It is to be observed that this is the kind of approach taken in the Unfair Contract Terms Act 1977.⁷⁴ Section 27 (2) of that Act does not strike down the choice of foreign law. It allows it to take effect, but subject to the controls of the Act. Of course, there could be a case in which to apply the law of the parties' choice subject to the injection of a mandatory rule of another law would be difficult and/or absurd. In such a case the mandatory rule would (almost *ex hypothesi*) be so fundamental that it would be the case in which the parties' choice ought to be rejected.

Perhaps, then, it may be concluded that under current English private international law the parties to a contract are free to make any reasonable choice of the governing law. Any choice will be regarded as *prima facie* reasonable. A court will be sorely tempted to hold a choice unreasonable, and therefore totally ineffective, only if the clearly chosen law is the law of a country having little or no connection with the parties or their transaction, *and* to apply the chosen law would involve a significant violation of a mandatory rule of the law which, judged by objective criteria, would clearly be the proper law of the contract—such violation affecting the actual outcome of the proceedings *and* it would be impracticable to give effect to the parties' choice subject to compliance with the mandatory rule.

For comparative purposes it is interesting to note the way in which the problem is dealt with in the EEC Convention on the Law Applicable to Contractual Obligations. Article 3 (1) of the Convention lays down a primary rule that 'A contract shall be governed by the law chosen by the parties', but Article 3 (3) goes on to provide as follows:

The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called 'mandatory rules'.

Having regard to the use of the word 'all' this paragraph is itself seemingly concerned only with the case in which the contract is in effect purely

⁷⁴ Above, pp. 10-11.

domestic to a country other than the country of the chosen law.⁷⁵ Article 7, however, makes further provision in relation to the evasion of mandatory rules. Article 7 (1) provides:

When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and insofar as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

This provision, unlike Article 3 (3), is purely permissive;⁷⁶ but it covers, not only the case in which all the facts (other than the factor of choice) are connected 'with one country only', but also any case in which there is a 'close connection' with another country.⁷⁷ Provided that the term 'close connection' is construed as denoting a 'very close connection' (and in practice usually 'closest connection'), it is submitted that the provision is a benign one and in fact largely reflects present English private international law. It is, therefore, to be hoped that, (if and) when the UK effectively adopts the Convention, it will not reserve the right not to apply the provisions of Article 7 (1).⁷⁸

Dicey and Morris's Rule 180 provides that, if the intention of the parties cannot be ascertained, the proper law of a contract shall be 'the *system of law* with which the transaction has its closest and most real connection'.⁷⁹ The corresponding provision of the EEC Convention is that in such circumstances 'the contract shall be governed by the law of the *country* with which it is most closely connected'.⁸⁰ In *Whitworth Street Estates Ltd. v. Miller*⁸¹ Lord Reid said: 'Two slightly different tests have been formulated: the *system of law* by reference to which the contract was made or that with which the transaction has its closest and most real connection' and 'with what *country* has the transaction the closest and most real connection'.⁸² The distinction between the two tests was in fact neatly illustrated by the circumstances of the *Whitworth* case itself. There Lord Reid said: 'In the present case the form of the contract may be said to have its closest connection with the system of law in England but the place of

⁷⁵ But the phrase 'relevant to the situation' may perhaps allow for some margin of flexibility.

⁷⁶ Contrast the use of the word 'may' with the use of the words 'shall not' in Article 3 (3).

⁷⁷ See, too, Article 5 (2) and Article 6 (1). Article 5 makes special provision for certain consumer contracts, and para. (2) lays down that in specified circumstances notwithstanding Article 3 'a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence'. Article 6 deals with individual employment contracts, and para. (1) provides that a choice of law by the parties 'shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules' of the law of the country in which he habitually carries out his work in performance of the contract, or (if he does not habitually carry out his work in any one country) by the law of the country in which the place of business through which he was engaged is situated.

⁷⁸ Article 22 (1) provides that: 'Any State may, at the time of signature, ratification, acceptance or approval, reserve the right not to apply: (a) the provisions of Article 7, paragraph (1) . . . '.

⁷⁹ See above (*italics supplied*).

⁸¹ [1970] AC 583.

⁸⁰ Article 4 (1) (*italics supplied*).

⁸² *Ibid.* 603-4 (*italics supplied*).

performance was in Scotland and one must weigh the relative importance of these two'.⁸³ The contract, particularly having regard to its form and terminology, was intimate with English law. The contractor was, however, Scottish, the contract was finally concluded in Scotland, and all the work to be done under it was to be done in Scotland: Scotland was, therefore, the country with which the transaction was most closely connected.

A different, but it is submitted related, question as to the proper formulation of the objective test was adverted to by Megaw LJ in *Coast Lines Ltd. v. Hudig and Veder Chartering NV*.⁸⁴ There, the parties' intention as to the governing law being unclear, the Court of Appeal had recourse to a test in terms of closest and most real connection. Megaw LJ emphasized the significance of the use of the word 'transaction' rather than 'contract' in this context: the focus should be upon factual activity rather than upon the terms and terminology of the contract. His Lordship said:

I think it is not without significance to note that the connection which has to be sought is expressed to be connection between the *transaction*—that is, the transaction contemplated by the contract—and the system of law. That, I believe, indicates that where the actual intention of the parties as to the proper law is not expressed in, and cannot be inferred from, the terms of the contract (so that it is impossible to apply the earlier part of the *Bonython* formula: 'the system of law by reference to which the *contract* was made') more importance is to be attached to what is to be done under the contract—its substance—than to considerations of the form and formalities of the contract or considerations of what may, without disrespect, be described as lawyers' points as to inferences to be drawn from the terms of the contract.⁸⁵

These two questions of formulation constitute, it is submitted, a large part of the explanation of the apparent tendency (referred to by Lord Wilberforce in *Amin Rasheed Corporation v. Kuwait Insurance Co.*)⁸⁶ of cases in which the parties' intention can be inferred, and those in which it cannot, 'to merge into each other'.⁸⁷ The resolution of the twin uncertainties (and consequential negation of that tendency) is capable of achievement. So long as the object of the court's inquiry is the intention of the parties, the language, terminology, form and terms of the contract will very often⁸⁸ constitute a useful guide, bearing in mind that the search is for the *system of law* which they intended (or assumed) would govern their *contract*. However, once that search has been abandoned, the determination of the parties' intention (or assumption) with any degree of realism being impossible, resort must perforce be had to a purely objective test (as distinct from one based upon an 'objectively' determined intention). Application of this purely objective test involves *geographical location* of the *transaction*. It is then actual or contemplated factual activity, rather

⁸³ Ibid. 604.

⁸⁴ [1972] 2 QB 34.

⁸⁵ Ibid. 46.

⁸⁶ [1984] AC 50; see above.

⁸⁷ See p. 9 above.

⁸⁸ Although not invariably: see references at pp. 17–18, above, to another aspect of Lord Wilberforce's judgment in *Amin Rasheed Corporation v. Kuwait Insurance Co.*, [1984] AC 50.

than inference from the form, etc., of the contract, that is most relevant. Connection between a legal form (such as a contract) and a legal system can be indicative of the parties' intention as to the governing law; but connection between factual activity (embodied in a transaction) and a country signifies physical location.⁸⁹ It is noteworthy that in the *Whitworth Street Estates* case those of their Lordships who were unable to discern any clear intention on the part of the parties attached great importance to the fact that it was in Scotland that the performance was to take place.⁹⁰ It is submitted that in cases in which there is inadequate evidence as to the parties' intention or assumptions as to the governing law, the applicable law should be that of the *country* with which their *transaction* has its closest and most real connection.⁹¹

IV

The law of contract has a diversity of facets, and the range of problems to which they variously give rise cannot all be adequately and appropriately accommodated in a conflict of laws situation by automatic and exclusive reference to one system of law. The proper law of a contract is indeed the generally applicable law, but there are particular areas of contract law in which it is exceptionally not applied, or not applied exclusively. Five such areas in the English private international law of contract call for some comment.

(a) *Formal Validity*

The juridical category designated 'formal validity' is relatively narrow. In most systems of domestic law (and markedly in common law systems) commercial contracts can be entered into without undue formality. For the purposes of English private international law there is no doubt that compliance with such formal requirements as may be imposed by the law of the place of contracting will suffice, and will do so even if there has been no compliance with the formal requirements of the proper law. Historically this is a vestigial survival of the general operation in the private international law of contract of the principle *locus regit actum*. Until the emergence in the mid-nineteenth century of notions of the autonomy of the parties and of the proper law, the *lex loci contractus* was the generally governing law. Contemporary justification for its continuing operation in regard to formalities is to be found in terms of the

⁸⁹ It is, with all respect, surprising that Lord Reid should in the *Whitworth* case have thought that the two tests 'must be combined' ([1970] AC 583, 604) as there the closest and most real connection was with English law but with Scotland, and that Lord Hodson did not 'see that this variation of language is important' (ibid. 606). Also, it follows from the analysis set out in this article that Megaw LJ could with greater felicity have referred to 'country' rather than 'system of law' in the opening sentence of the passage from his judgment in *Coast Lines Ltd. v. Hudig and Veder Chartering NV* cited above.

⁹⁰ [1970] AC 583, *per* Lord Reid at p. 605, Lord Guest at p. 608 and Lord Wilberforce at p. 615.

⁹¹ This would involve the substitution of 'law of the country' for 'system of law' in *Dicey and Morris's* Rule 180 (p. 8 above), and the substitution of 'the transaction' for 'it [the contract]' in Article 4 (1) of the Convention (p. 20 above).

convenience of the parties: to require parties to comply with formal requirements other than those that are locally available would be unreasonable. If this is seen as being the only reason for modifying in this area the otherwise general applicability of the proper law, the principle should operate merely facultatively: parties, although not required to comply with formal requirements of the proper law, should have the alternative option of doing so. Moreover, it is to be remembered that the place of contracting may be fortuitous, may be deliberately contrived, may be factually unknown, or may be legally uncertain. A rule demanding, as distinct from merely permitting, compliance with the law of the place of contracting would require strong justification. Although there is no clear English authority on the point, it can safely be assumed that it will be only in quite exceptional circumstances that compliance with the formal requirements of the proper law will not suffice. It is true that there have been *dicta* suggesting the contrary, but these are of some antiquity,⁹² and there is at least one decision upholding the validity of even a marriage settlement there having been compliance with the formal requirements of the proper law of the settlement.⁹³ It is generally accepted that the choice of law rule governing the formal validity of a commercial contract is a rule of alternate validating reference.⁹⁴ The absence of direct authority may be indicative, not of uncertainty, but of the limited importance of this aspect of the subject. This in its turn derives, as has been already pointed out, from a general paucity of formal requirements at the domestic law level.⁹⁵ Furthermore, courts have sometimes succumbed at the conflict of laws level to the temptation to characterize as procedural an issue which might otherwise qualify as one of formality.⁹⁶

(b) *Personal Incapacity to Contract*

Here, too, there is a lack of English authority. It is, however, generally accepted that a party will be deemed to be capable if he or she is capable under the law of the country with which the transaction has its closest and most real connection.⁹⁷ The proper law can confer capacity, but for this

⁹² See, e.g., *Clegg v. Levy* (1812), 3 Camp. 166, decided at a time when the *lex loci contractus* was still the generally applicable law. But as late as 1927 no lesser judge than Scrutton LJ in *Republica de Guatemala v. Nunez* appears to have lent his authority to the view expressed by Greer J below that 'when a transaction is invalid or a nullity by the law of the place where the transaction takes place owing to omissions of formalities or stamp, it will not be recognised in England': [1927] 1 KB 669, 691.

⁹³ *Van Grutten v. Digby* (1862), 31 Beav. 561, esp. 567.

⁹⁴ See, e.g., *Dicey and Morris*, op. cit. above (p. 7 n. 30), Rule 183. Compare and contrast the EEC Convention on the Law Applicable to Contractual Obligations, Article 9.

⁹⁵ Any analogy with the case of marriage would not be apt. There the juridical category of formal validity is very wide, and compliance with the requirements of the law of the place of celebration is mandatory. This position represents recognition of the strong and legitimate interest of the local community in control of the celebration of marriages.

⁹⁶ The characterization in *Leroux v. Brown* (1852), 12 CB 801, of the requirement of writing under the old Statute of Frauds as 'procedural' is a notorious example.

⁹⁷ The decision of the Ontario Court of Appeal in *Charron v. Montreal Trust Co.* (1958), 15 DLR (2d.) 240, would almost certainly be treated as persuasive in England. There, despite lack of

purpose it is (the parties' choice to the contrary notwithstanding) always an objectively determined proper law. If this were otherwise parties could confer capacity upon themselves by selection of a governing law under which they would have capacity. There is, however, doubt as to whether, and if so to what extent, capacity under another law, such as the law of the place of contracting or the law of the party's domicile, should, or does, suffice. At the policy level the position is complicated by the duality of purposes underlying issues of capacity. In some cases a party, usually a plaintiff, may seek to demonstrate capacity for the purpose of enabling. In other cases a party, usually a defendant, may seek to show incapacity for the purpose of protection. The structure and purpose of many domestic law rules make the latter case the more common. However, it is in this latter case that considerations of general commercial convenience tend to militate against respect being accorded to lack of capacity under any system of law other than the objectively determined proper law. A foreign visitor should not be allowed to plead lack of contractual capacity under the law of his domicile when, having obtained goods on credit, he has failed to pay for them.⁹⁸ On the other hand, it does not necessarily follow that a foreign visitor should be precluded from suing a seller for failure to deliver on the ground that, although fully capable under the law of his domicile, he would lack capacity if he were domiciled locally. There is, therefore, room for the view that a party should be able to rely for enabling purposes upon his capacity under the law of his domicile. *Dicey and Morris* accept that this appears to be English law, at least if domicile is coupled with residence.⁹⁹ On the other hand, the case for permitting reliance upon capacity (or, indeed, for pleading incapacity) under the law of the place of contracting is relatively weak. It is true that there are sweeping *dicta* which go so far as to assert that this law alone governs issues of contractual capacity. Indeed, as late as 1946 Lord Greene MR said in *Baindail v. Baindail*:¹⁰⁰ 'In the case of infants where different countries have different laws, it certainly is the view of high authority here that capacity to enter in England into an ordinary commercial contract is determined, not by the law of the domicile but by the *lex loci*.' It is, however, to be observed that on its face this

capacity by the law of the parties' Quebec domicile, the contract was upheld under the Ontario proper law.

⁹⁸ Sweeping *dicta* to the effect that the law of a party's domicile *per se* governs contractual capacity are unsupportable. Such was that of Cotton LJ in *Sottomayor v. De Barros (No. 1)* (1877), 3 PD 1 (a marriage case), where he said (p. 5): 'it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicile'. In *Cooper v. Cooper* (1888), LR 13 App. Cas. 88, Lord Macnaghten said (at p. 108) more cautiously: 'Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad, seems to be in favour of the law of the domicile.'

⁹⁹ *Dicey and Morris*, op. cit. above (p. 7 n. 30), Rule 182. See, too, the American Law Institute *Restatement, Second, Conflict of Laws* (1971), section 198, which states that the proper law applies but adds (section 198 (2)): 'The capacity of a party to contract will usually be upheld if he has such capacity under the local law of the State of his domicile.' For the capacity of a corporation see *Dicey and Morris*, op. cit., Rule 174 (1): 'The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the transaction in question.'

¹⁰⁰ [1946] P 122, 128.

pronouncement applies only to contracts entered into in the *forum*. Such a limitation would itself be difficult to defend. But the wider objection is that, as was pointed out when considering formal requirements,¹⁰¹ the place of contracting may be fortuitous, contrived or unknown. Moreover, the place of contracting is usually deemed to be the place in which the last event necessary for the formation of the contract occurs. It is hard to see why in such a case that law has a special claim to govern a party's capacity. At the same time it is to be remembered that the law of the place of contracting will often in fact be the objectively determined proper law.

(c) *Formation: a Separate Issue?*

The view has been canvassed that issues pertaining to the formation of a contract are distinct from issues as to its validity, and that they may merit separate treatment. Logically this view is difficult to sustain. An issue as to whether a contract has been formed (be it formally or essentially) is only a meaningful issue if it is as to whether it has been *validly* formed. In this sense formation and validity (be it formal or essential) coincide. However, in many systems of domestic law certain matters bearing upon the phenomenon of agreement,¹⁰² the existence of an intention to be legally bound, and (in common law countries) consideration (or the use of the seal) are presented as matters of formation, whereas matters such as mistake or misrepresentation are seen as matters of validity. This differentiation is often not simply one of method of presentation: it usually has some normative significance—it may, for example, affect the burden of proof. Nevertheless, considerations such as these do not warrant differentiation for the purposes of choice of law in private international law. The proper law of a contract is the generally applicable law, and it is difficult to see why it should, for example, be less applicable to an issue of agreement than it is to an issue of mistake. In order to meet the specious contention that a contract 'cannot have a proper law unless it (the contract) exists', the notion of the 'putative proper law' has been constructed. The putative proper law is the law which will be the proper law on the assumption that the contract is formed, the validity of which assumption is itself determined by reference to it. *Dicey and Morris*, Rule 181, puts it thus: 'The formation of a contract is governed by that law which would be the proper law of the contract if the contract was validly concluded'.¹⁰³ This Rule has been expressly approved by the Court of Appeal in *Compania Naviera Micro SA v. Shipley International Inc. (The Parouth)*.¹⁰⁴ Again, in *Britannia SS Insurance v. Ausonia*¹⁰⁵ it was held that English law governed

¹⁰¹ See p. 23 above.

¹⁰² For example, such issues as: What constitutes an offer? How must acceptance be communicated? Can an offer be revoked? If so, how? etc.

¹⁰³ See, too, the EEC Convention, Article 8 (1): 'The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.' But see, too, p. 26 n. 108 below.

¹⁰⁴ [1982] 2 Lloyd's Rep. 351.

¹⁰⁵ [1984] 2 Lloyd's Rep. 98, esp. *per* Ackner LJ at pp. 100–1.

a question of formation because, if a contract had been formed, the proper law would be English.

Dicey and Morris previously stated that: 'It seems that, in determining the putative proper law, an express choice of law by the parties will be disregarded.' This was inexplicable but has now been modified.¹⁰⁶ The whole point of applying the putative proper law is that it is (or will be) the law governing validity, quite regardless of whether this is (or will be) because it represents the parties' choice or because it is the law of the country of closest and most real connection.

An early if unarticulated operation of the doctrine of the putative proper law is to be seen in the case of *Re Bonacina*.¹⁰⁷ The textbooks on the English domestic law of contract traditionally present the requirement of consideration for a contract not made under seal as pertaining to formation. The Court of Appeal held that a promise to pay made in Italy by one Italian to another, but unsupported by consideration, constituted a contractual debt provable in English bankruptcy proceedings. Under the Italian (putative) proper law a valid contract had been formed.

This is, however, an area in which the relationship between characterization and choice of law may be important. Suppose that, for example, a Ruritanian business man were to write from Ruritania to an English business man in England making an offer which, if accepted, would give rise to a contract to be performed in Ruritania, the offer containing a term that the governing law of such contract would be Ruritanian law. Suppose, too, that there is a rule of Ruritanian law to the effect that such an offer, if not rejected within thirty days, is deemed to be accepted. If the English recipient were simply to ignore the offer, no English court would hold him contractually bound. Ruritanian law would on any reckoning be the (putative) proper law, but despite its valid formation by that law the 'contract' would not be enforced. The reason would be that such a unilateral offer situation is so remote from the English concept of contract that it simply would not be regarded (or characterized) as being within the purview of even the private international law of contract.¹⁰⁸ Characterization is sometimes castigated as an 'escape route'. It is in fact an integral and essential part of the choice of law process.

(d) *The Mode and Manner of Performance*

Matters relating to the discharge, including the discharge by performance, of a contract are normally governed by the proper law. However,

¹⁰⁶ Op. cit. above (p. 7 n. 30), 10th edn. (1980), p. 777; but see now 11th edn. (1987), pp. 1200-1.

¹⁰⁷ [1912] 2 Ch. 394.

¹⁰⁸ To be contrasted with this analysis is the somewhat clumsy (and not very adequate) way in which an attempt to deal with the problem is made in the EEC Convention by the introduction of a subsidiary choice of law rule qualifying the doctrine (set out in Article 8(1)) of the putative proper law. Article 8(2) runs thus: 'Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.'

Dicey and Morris Rule 186 (2), states: 'In the absence of evidence that the parties intended another law to apply, the mode of performing a contract, as distinct from the substance of the obligation, is governed by the law of the place at which the obligation is to be performed.'¹⁰⁹ This is an area not devoid of difficulty. First, the distinction between the 'substance of the obligation' and the permitted 'mode and manner' of its discharge is not easy to discern in simple logic. If the 'substance of the obligation' were to be defined with total completeness and precision, that definition would cover matters pertaining to the required (or permitted) 'mode and manner' of discharge. The differentiation must be seen then as one, not of logic, but of policy: it is postulated that some issues relating to performance should (exceptionally) be submitted to the *lex loci solutionis* rather than to the proper law. Secondly, there has been some failure to distinguish three different types of situation in which resort is, or appears to be, had to the *lex loci solutionis* in this context. The first of these is the case in which particular rules of that law have been incorporated into the proper law. This is in reality simply a case of applying the proper law. The second is the case in which effect is being given to the intention (often the presumed intention) of the parties that on a particular issue relating to performance the *lex loci solutionis* should control. If, for example, a German contract provides for delivery of goods in Paris 'during usual business hours' it will, in the absence of persuasive evidence to the contrary, be assumed that the parties intended French law to determine what business hours are 'usual'. This is the type of case seemingly dealt with in *Dicey and Morris* Rule 186 (2). But there is a third case: it is the case in which resort will be had to the *lex loci solutionis* regardless of the intention of the parties. In the case of a contract for the carriage of goods by sea the law of the country where the cargo is to be unloaded will govern many aspects of unloading, regardless of the proper law and regardless of the intention of the parties. In such a case this is clearly demanded by the convenience of the *locus solutionis*. Another and third source of confusion in this general area has been the suggestion that, in identifying the currency of payment of a contractually due sum, an interpretative, as distinct from an occasional overriding, function is to be accorded to the *lex loci solutionis*. If parties to a transnational contract designate payment of, say, 100,000 dollars, assessment of value will, of course, be determined by reference to the proper law. It is submitted that, so too, *prima facie* should be the determination of the currency required or permitted to be used. The law of the place of performance may have overriding control; but, in the absence of this, the proper law should not be dethroned.¹¹⁰

Two general questions defy precise answers. The first is as to the extent to which the parties may by their choice submit issues pertaining to the

¹⁰⁹ *Op. cit.* above (p. 7 n. 30), p. 1236.

¹¹⁰ See, e.g., *Bonython v. Commonwealth of Australia*, [1951] AC 201. See, too, *Dicey and Morris*, *op. cit.* above (p. 7 n. 30), pp. 1238-9.

'mode and manner' of performance to the *lex loci solutionis* when this is not the proper law. The second is as to the circumstances in which such issues will be governed by the *lex loci solutionis* regardless of the intention of the parties. Both questions relate to *pro tanto* dethronement of the proper law—the law *prima facie* most appropriate to govern any contractual matter. Such dethronement is not to be countenanced except for good reason. With regard to the former question the reason must lie in the legitimate interests of the parties, whereas with regard to the latter it must lie in the legitimate and overriding concern of the *locus solutionis*. This is a sphere of the private international law of contract in which English authority has not been coherently worked out. One can, however, concur with *Dicey and Morris's* concluding generalization that 'the scope of the law of the place of performance is confined to matters of detail concerned with the mode, place and time of performance'.¹¹¹ A court is likely to be especially reluctant to classify an issue as pertaining to the mode and 'manner of performance' (at least in the third type of situation set out above) if a result of such classification would be significant disturbance of the economic balance of the parties' contract.

The way in which the problem is dealt with in the EEC Convention on the Law Applicable to Contractual Obligations is scarcely explicit. It being provided in Article 10 (1) that the applicable law (the proper law) shall govern matters of performance, Article 10 (2) states: 'In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.'

(e) *Aspects of Illegality*¹¹²

It is axiomatic that a contract void for illegality under its proper law must be regarded as a nullity. However, assuming that a contract is entirely lawful and valid by its proper law, what is the effect of illegality either under the law of the place in which it was made or under the law of the place in which it is to be performed? Formulated more precisely the two questions to be considered are: (1) What is the effect (if any) to be given to the circumstance that the making of such a contract was illegal under the law of the country in which it was made? and (2) What is the effect (if any) of the circumstance that an act, the doing of which is required by the terms of the contract, would be illegal by the law of the country in which it is to be done? In the contexts of these two questions illegality is taken to denote more than invalidity. Whereas the consequence of the latter is usually simply nullity, the consequence of illegality is often some more stern sanction. When assessing the appropriate responses to the two questions it is to be remembered that there is a specific rule

¹¹¹ *Op. cit.* above (p. 7 n. 30), p. 1240.

¹¹² On this subject generally, see a famous article published in this *Year Book* fifty years ago: F. A. Mann, 'Proper Law and Illegality in Private International Law', this *Year Book*, 18 (1937), p. 97.

of public policy which may well be operative here. This is the rule that inhibits English courts for reasons of public policy from acting, or being seen to act, in a way liable to jeopardize good relations existing at the national, international or political level between the UK and a foreign State.

In *Re Missouri Steamship Co.*¹¹³ Lord Halsbury said: 'Where a contract is void [under the law of the place of contracting] on the grounds of immorality or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it.'¹¹⁴ This was in fact *obiter* because there the contract, the proper law of which was English, was upheld notwithstanding that it contained a clause illegal under the law of the place of contracting. In any event Lord Halsbury seems to be suggesting no more than that occasionally an illegality under the *lex loci contractus* will be so monstrous and gross that it should not be countenanced in any other *forum*.¹¹⁵ It is perhaps hard to conceive of such a case which would not, in any event, be covered by the public policy heading adverted to above. Be this as it may, English private international law does not generally treat illegality under the *lex loci contractus* as automatically vitiating a contract valid under its proper law.

It is stated in *Dicey and Morris* in Exception 1 to Rule 184 that: 'A contract (whether lawful by its proper law or not) is, in general, invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*).'¹¹⁶ It is the view of the present writer that a proposition so broadly stated does not, and should not, represent English private international law.

It is true that Lord Wright sitting in the Court of Appeal in *R v. International Trustee*¹¹⁷ did refer to 'the well-known proposition that an English court will not enforce a contract where performance of that contract is forbidden by the law of the place where it must be performed' and that it is 'too well established now to require any further discussion'.

It is true, too, that, in the particular case in which the proper law is foreign but the *locus solutionis* is England, performance involving contravention of English law will not be enforced. There is some suggestion in the case law that in the precisely converse case, i.e. the case in which the proper law is English but the *locus solutionis* is a foreign country, a similar rule will be applicable. In *Foster v. Driscoll*¹¹⁸ an English contract, the purpose of which was the supply of liquor to the United States during the prohibition era, was held by the Court of Appeal to be unenforceable, but two of the members of the Court, Lawrence LJ and less explicitly Sankey

¹¹³ (1889) 42 Ch. D 321.

¹¹⁴ Ibid. 336.

¹¹⁵ *Dicta* supportive of Lord Halsbury's *dictum* are to be found in the Court of Appeal judgments in *The Torni*, [1932] P 27. A firm rule along these lines seems, however, to have been tacitly rejected by the Privy Council in *Spurrier v. La Cloche*, [1902] AC 446, 451. See, too, *Jones v. Oceanic Steam Navigation Co.*, [1924] 2 KB 730.

¹¹⁶ Op. cit. above (p. 7 n. 30), Rule 184, Exception 1 (p. 1218).

¹¹⁷ [1937] AC 500, 519.

¹¹⁸ [1929] 1 KB 470.

LJ, based their judgments on the doctrine of public policy (although the latter did approve the substance of what is now *Dicey and Morris's* Rule 184, Exception 1, set out above). In *Regazzoni v. Sethia*¹¹⁹ the House of Lords held that an English contract, performance of which would involve contravention in India of a politically highly sensitive rule of Indian law, could not be enforced. The decision was grounded in public policy: indeed it would be hard to conceive of a clearer example of the operation of the head of public policy which inhibits a *forum* from acting in a way which would be liable to jeopardize the good relations existing between the UK and another country. The rule of Indian law was one prohibiting the export of certain commodities to the politically obnoxious Republic of South Africa. A Court of Appeal case which may be seen as in some ways ambiguous as an authority is that of *Ralli Bros. v. Compania Naviera Sotay Azuar*.¹²⁰ There an English contract had provided for payment at a certain rate to be made in Spain. At the time of contracting this provision was lawful by Spanish (and by English) law. However, before the time at which payment became due, Spanish law was changed as a result of which only payment at a substantially lower rate was lawful. The plaintiff in English proceedings failed in his claim for payment at the agreed (higher) rate. The Court of Appeal would appear to have regarded illegality (even subsequent illegality) under the Spanish *lex loci solutionis* as being decisive—but decisive, not of the total invalidity of the contract, but simply of its invalidity to the extent that it required payment at the higher rate. This is, of course, in conformity with the *Dicey and Morris* Exception. However, the judgment which is of particular interest is that of Scrutton LJ. His Lordship concluded:

I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that State.¹²¹

The use of the phrase 'continuing validity' clearly indicates that Scrutton LJ saw the matter as being one, not of validity (even partial invalidity), but of discharge. Moreover, Scrutton LJ's reference to an 'implied term', made at a time when the prevailing explanation of the English doctrine of frustration was based on the 'implied term' theory, strongly suggests that he regarded the contract as having been discharged by a frustrating event in accordance with its English proper law. The frustrating event was the change in Spanish law, this being regarded as a change in the fact situation because foreign law is fact.

In the view of the present writer illegality by the *lex loci solutionis* should not generally vitiate, or even partially vitiate, a contract. The cases which may suggest otherwise are cases in which the proper law was English.

¹¹⁹ [1958] AC 301.

¹²⁰ [1920] 2 KB 287.

¹²¹ *Ibid.* 304.

While to distinguish them on this ground would seem irrational, they can hardly justify a general exception to the doctrine of the proper law. Even *Dicey and Morris* in their Comment concede that it is perhaps an open question as to whether an English court need treat a valid French contract as nevertheless invalid in so far as performance of it would be unlawful under Spanish law, Spain being the designated *locus solutionis*.¹²² In *Zivnostenska Banka v. Frankman*¹²³ Lord Reid did express the view that it is 'settled law that, whatever be the proper law of the contract, an English court will not require a party to do an act in performance of a contract which would be an offence under the law in force at the place where the act has to be done'.¹²⁴ It is submitted that this *dictum* is indicative of a fallacy underlying a large part of this whole dispute, namely a failure to differentiate between the question of validity and the availability of a particular remedy, namely specific performance, in an English *forum*. Whatever the substantive rights of the parties, a *forum* must control the nature and availability of its remedies. It may well be barely conceivable that an English court would in its discretion order specific performance in circumstances such as those postulated by Lord Reid. The real question, therefore, is as to whether damages should be available. Why, it may pertinently be asked, should a party to a contract, entirely valid under its proper law, who has perhaps already had the benefit of the other party's performance, not be required to make money compensation in lieu of performance, this latter being prohibited by the *lex loci solutionis*? Some unease with the *Dicey and Morris* proposition was somewhat cryptically expressed by Diplock LJ (as he then was) in 1967 in *Mackender v. Feldia*.¹²⁵ There his Lordship drew a deliberate distinction between the effect of illegality under the proper law and its effect under the *lex loci solutionis*: whereas in the former the contract would be void, in the latter it would be only unenforceable either specifically or by way of damages. In the view of the present writer, not only would the meaning of this distinction be clearer,¹²⁶ but also its import would be positively benign, had the reference to unenforceability been confined to specific unenforceability.

Although illegality under the *lex loci solutionis* should not automatically and directly render a contract void, in many cases this actual result will for most practical purposes be reached, as already indicated, by virtue of the doctrine of public policy. There could also be one type of case in which, quite apart from the public policy of the *forum*, such illegality might legitimately operate although indirectly. This would be the case in which, although the contract is entirely valid under the domestic or internal rules

¹²² See *op. cit.* above (p. 7 n. 30), p. 796.

¹²⁴ *Ibid.* 78.

¹²³ [1950] AC 57.

¹²⁵ [1967] 2 QB 590.

¹²⁶ Presumably the effect of the distinction as stated would simply connote that, e.g., money already paid could not be recovered—the contract illegal by the *lex loci solutionis* being merely unenforceable. This could cause even greater hardship to a party who has performed but is denied effective entitlement to money compensation in lieu of the benefit of the other party's performance.

of the proper law, there is evidence that courts sitting in the country of the proper law would regard it as invalid to the extent that performance would be illegal under the *lex loci solutionis*. Any suggestion that on this account an English court ought similarly to regard the contract as to that extent invalid would, no doubt, be anathema to doctrinaire anti-*renvoyistes*. Moreover, in cases in which the parties have indicated a choice of the governing law, this approach would often involve a limitation upon the effectiveness of that choice. The case for taking account of the attitude of the courts sitting in the country of the proper law to illegality under the *lex loci solutionis* would, however, obviously be at least arguable if the identity of the proper law has perforce been determined on the basis of close and most real connection.

It is submitted that in a case in which it would not be contrary to the public policy of a country for its courts to be seen as enforcing, even by way of a damages award, a contract the performance of which would be illegal by the law of the country in which it must take place, the only effects of that illegality *per se* should be (1) to inhibit the availability of a remedy such as specific performance; (2) to constitute, in relevant circumstances, a fact to be taken into account in the application of the internal proper law (whether or not this is English);¹²⁷ and possibly (3) to render the contract void to the extent that it would be regarded as void on this account by a court sitting in the country of the proper law—and then perhaps only in cases in which the proper law has been determined objectively.

V

This article is not, and does not purport to be, comprehensive. The subject is a large and important one in private international law. The article has ranged widely, but incompletely and often superficially. If the writer is allowed a general conclusion it is that by and large the English private international law of contract is in relatively good order. It is difficult to point to many (if any) reported cases in which the result at least has produced manifest injustice. So far the subject has very largely escaped from what the late Professor Cheshire referred to as the 'paralysing hand of the Parliamentary draftsman'.¹²⁸ In the light of the volume, complexity and sophistication of this branch of private international law, one can only view with scepticism and alarm any suggestion that it can be distilled into some twenty¹²⁹ short articles of a convention. Yet it is basically this, tempered by various 'improvements', that the EEC Convention on the Law Applicable to Contractual Obligations endeavours to achieve.

¹²⁷ See, e.g., the judgement of Scrutton LJ in *Ralli Bros. v. Compania Naviera Sota y Azuar*, [1920] 2 KB 287, considered above. That case was concerned with the effect of subsequent illegality for the purposes of the doctrine of discharge by frustration. The doctrine of common mistake could illustrate the effect of initial invalidity.

¹²⁸ Cheshire, *Private International Law* (1935), Preface.

¹²⁹ The remainder of the thirty-three articles of the Convention are not concerned with substance of the law.

THE UNITED KINGDOM NATIONALIZATION CASES AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

By MAURICE MENDELSON¹

I. INTRODUCTION

IN 1977 the United Kingdom Parliament passed the Aircraft and Shipbuilding Industries Act ('the Act') nationalizing specified aircraft and shipbuilding companies. The former owners of seven of them were dissatisfied with, in particular, the measure of compensation provided under the statute and brought applications under the European Convention on Human Rights ('the Convention'). The matter was referred by the European Commission of Human Rights ('the Commission') to the European Court of Human Rights ('the Court'), which, under the name *Case of Lithgow and others*, gave judgment for the Government on 8 July 1986. The case raises interesting and important questions about the level of compensation required under the Convention and general international law, which it is the purpose of this paper to examine.² After giving an account of the factual and legislative background and of the procedure before the Strasbourg organs, the main issues in the case and the decisions on them will be analysed under the headings 'Entitlement to Compensation' (section IV), 'Valuation' (section V), 'Discrimination' (section VI), 'Fair and Speedy Determination' (section VII), and 'Miscellaneous Issues' (section VIII).

II. BACKGROUND

As early as 1971 the (opposition) Labour party had announced its intention of nationalizing the shipbuilding and ship-repairing industries when it came to power. Following the General Election of February 1974 it formed a minority government, which became a majority government after a further election in October. In July the Secretary of State for Industry confirmed that the nationalization programme would be carried out, and in October the aerospace industry was added to the list. British shipbuilding was in a severe decline, and in the Government's view the

* © Professor Maurice Mendelson, 1987.

¹ Professor of International Law in the University of London, University College London. The author was of counsel for Vosper plc, one of the applicants in the cases under discussion; but the views expressed here are personal.

² The facts relating to each of the seven applicants varied significantly; as did the legal submissions they made. An accurate account of what was virtually seven cases must therefore necessarily be a somewhat lengthy one, though some simplification and compression has been attempted in order not to overtax the patience of the reader.

necessary changes could not come about whilst the industry was in fragmented private ownership. In the case of the aircraft builders, the reasons given included the need to increase the public accountability of an industry unusually dependent on public funds, and the greater efficiency which would result from the merger of the two main groups involved.³

In November 1974 a statement was made in the House of Commons regarding the safeguarding of the industries' assets from dissipation prior to passing into public control; but, in the words of the Commission, the Parliamentary proceedings which finally brought about the nationalization in 1977 'were exceptionally long and complex'⁴—a fact which, as we shall see, lies at the heart of the dispute. The cause was partly the fierce opposition which the legislation aroused in Parliament, and partly procedural errors on the part of the Government.

The first nationalization Bill was announced on 17 March 1975. Under it, the securities in forty-one shipbuilding, ship-repairing and associated companies, and two aerospace companies, were to be nationalized. Securities quoted on the Stock Exchange were to be valued at their average price during a six-month period ending on 28 February 1974 (the date on which Labour came to power), whilst unquoted securities were to be valued, by agreement or arbitration, as if they had been quoted during the same reference period. Safeguarding provisions were also included, whose object was to control dividends and interest and to prevent the disposal of assets and other abnormal transactions by the owners or directors of the companies between the compensation reference period or the date of the 'safeguarding statement' in the Commons and the date when they finally came into public ownership. If a transaction fell foul of these provisions, it might be declared void, the directors might be personally liable, or a deduction might be made from the compensation otherwise due, depending on the circumstances.⁵

Owing to lack of Parliamentary time the Bill was not proceeded with and lapsed at the end of the session. A second Bill, in essentially the same terms, was introduced in November 1975; but it, too, ran into difficulties with regard to both procedure and the merits and lapsed when the differences between the Lords and the Commons could not be resolved before the end of the 1975-6 session. A third Bill, in the same terms, was introduced early in the new session and quickly passed all the stages in the Commons. However, in the Lords the objection was (again) raised that it was 'hybrid'—that is, a cross between a public and a private Bill⁶—

³ Applications 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81 and 9405/81, *Sir William Lithgow and others v. United Kingdom*, Commission Report of 7 March 1984 (hereinafter 'CR'), paras. 14-21.

⁴ *Ibid.*, para. 22.

⁵ The complaints of some of the petitioners about the application of these provisions was a rather minor issue into which it is not proposed to enter here; however, as we shall see (below, Section V), the existence of these safeguarding provisions appears to have influenced the Commission unduly when it came to the valuation of the securities.

⁶ For a discussion of hybrid bills, see O. Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (6th edn., 1978), p. 212.

because certain ship-repairers had been excused nationalization. The effect of this ruling would have been to entitle the interests affected to be heard in opposition to the legislation, further delaying the process. Consequently, the Government agreed to an amendment which excluded ship-repairers altogether. The modified Bill received the Royal Assent on 17 March 1977, and 31 companies' shares⁷ passed into the ownership of two new public corporations, British Aerospace and British Shipbuilders, on the 'vesting days' of 29 April and 1 July 1977, respectively.

By section 41 of the Act, a 'Stockholders' Representative' was to be appointed to represent the interests of the former shareholders. His function was, in particular, to negotiate with the Government as to the value, under the statutory criteria, of the shares which had been taken; if agreement could not be reached, provision was made for the determination of the value of shares not quoted on the Stock Exchange (referred to below as 'the unquoted shares') by the Aircraft and Shipbuilding Industries Arbitration Tribunal, a body created specifically for this purpose by section 42 of the Act. When the 'base value' of the shares had been determined or agreed, Government stock known as 'compensation stock' was to be issued to the former owners for that amount, less any deductions due under the safeguarding provisions and any compensation payments on account. Interest on the compensation stock was to accrue from the vesting day, at a rate to be determined by the Treasury.

Shares in one company, and preference shares in another, were the only ones quoted on the Stock Exchange; in these cases, their value was determined before, and full compensation paid on, the vesting day. In the remaining cases, payments on account were made in 1978; negotiations as to value and deductions proceeded during that year, and in some instances resulted in agreement. In a very few cases, arbitration proceedings were instituted; but in most instances the Stockholders' Representatives formed the view that the Tribunal had no jurisdiction to stray outside the statutory criteria, and that they risked spending considerable additional time and costs only to receive an award which might be no greater, and could be smaller, than what the Government was already offering. Ultimately, all of the Representatives in this group accepted the compensation offered by the Government, although in some cases under protest and with the reservation of the shareholders' Convention rights. As we shall see, their complaint was not about the fact of nationalization, but about the compensation paid, which they regarded as grossly disproportionate to the true value of the assets taken.

In May 1979 the election of a Conservative Government had initially encouraged those shareholders who had not already settled to hope for better compensation terms. Whilst in opposition, the Conservative Party had fought bitterly against the nationalization Bills, not least front-bench

⁷ Most, though not all, of the securities in the companies were in the form of shares, and it will be convenient to refer to all forms of security as 'shares' and to their owners as 'shareholders'.

spokesmen who were now elevated to the Cabinet; they had, indeed, promised to repeal the legislation when they came to power. But the former owners were doomed to disappointment. The new Government reviewed the matter, but Sir Keith Joseph, then Secretary of State for Industry, announced in August 1980 that:

We recognise that some previous owners and many members of this House and of the public believe that the terms of compensation imposed by the 1977 Act were grossly unfair to some of the companies and we share this view. We have explored every possibility to right the injustice done by the previous Government, but to our very great regret we have concluded that amending legislation to establish new compensation terms retrospectively would be unjust to the many people who sold shares on the basis of the previous terms.

The Minister did, however, agree to adjust some of the compensation terms in the relevant cases, and settlements were reached in all cases by the end of 1980.

To arrive at a value for the unquoted shares, section 38 (1) of the Act specified that the base value should be 'such as may be determined by agreement between the Secretary of State and the Stockholders' Representative or, in default of such agreement, as may be determined by arbitration under this Act to be the base value which the securities would have had under section 37', which was the average of their (hypothetical) weekly quotations during the reference period. The Department of Industry used two main methods to arrive at such a hypothetical Stock Exchange valuation of the shares of profitable companies.⁸ They were as follows:

- (i) Earnings-based valuation. This involved the application of an appropriate multiplier (price-earnings ratio) to a figure based on the company's historic and prospective post-tax earnings. The multiplier was determined by comparison with similar companies which were listed on the Stock Exchange. This method was used for five of the seven applications before the Court.
- (ii) Parent company-related valuation. Section 38 (6) of the Act specified that if the company was a subsidiary of another body corporate (the parent company) and formed a substantial part of the undertakings of the parent group, then the Arbitration Tribunal was to include the parent's stock market valuation as one of the relevant factors in determining the base value of the subsidiary's shares. This method was used for the remaining two cases before the Court (Vosper plc and Yarrow plc).

In seven cases the shareholders were sufficiently dissatisfied with the amount of compensation they received under the Act to institute

⁸ In cases where the company was not making a profit, an assets-based valuation was made or, in one instance, a share-capital-related method. See European Court of Human Rights, Judgment of 8 July 1986, Series A, No. 102 (hereinafter 'Judgment'), para. 36.

proceedings under the Convention. Their cases will now be individually examined, in the order in which they complained to the Commission.⁹

(i) *Vosper plc* made an application¹⁰ regarding the nationalization of two subsidiary companies, both engaged in naval shipbuilding and ship-repair. These were Vosper Thornycroft (UK) Ltd. and Vosper Shipbuilders Ltd., collectively known as 'Vosper Thornycroft', which together generated about 95 per cent of the business of Vosper plc. The shares of Vosper plc were listed on the Stock Exchange. Vosper Thornycroft had shown a steady increase in profits in the years preceding nationalization;¹¹ at vesting day, it was making pre-tax profits of £7.85 million on assets which the Stockholders' Representative (a leading accountant) valued at £37.7 million as of vesting day.¹² The Department offered £3.5 million compensation in March 1979; the new Government eventually raised that figure by stages to £5.3 million in September 1980; Vosper accepted this under protest, and payment of the outstanding balance of £3.95 million was made shortly thereafter.

(ii) *Sir William Lithgow's* application¹³ related to a firm of marine engineers, John G. Kincaid & Co. ('Kincaid'), in which he owned some 28 per cent of the ordinary shares, and was thus the largest single shareholder. The company had been consistently profitable in the years leading up to nationalization. Sir William claimed that its net assets were alone worth about £9.5 million during the reference period and £18 million at vesting day, of which £4.9 million was in cash; yet negotiations between the Department of Industry and the Stockholders' Representative led to an agreed figure of £3.8 million compensation (i.e. less than the company's cash in hand). The shareholders voted to accept this offer at a meeting in November 1979, although Sir William abstained from voting because he considered that the agreed figure did not represent Kincaid's true value. The applicant himself received just over £1 million in compensation,¹⁴ but paid £208,000 of that in capital gains tax.

(iii) *Banstonian Co.*, and its parent company, *Northern Shipbuilding and Industrial Holdings Ltd.*, registered an application¹⁴ regarding the nationalization of Hall Russell & Co., a Scottish shipbuilding and repair company, which was a wholly owned subsidiary of Banstonian. Although the company's fortunes declined in 1974 and 1975, it was consistently

⁹ Vosper plc was the first company to introduce a preliminary complaint, in September 1977, but the cases bear the name of Lithgow because Sir William Lithgow's application was the first to be registered by the Commission, in June 1980, after the statutory compensation had been agreed.

¹⁰ Application 9262/81.

¹¹ Whilst merchant shipbuilding was—and remains—in a very parlous state in Britain, naval shipbuilding was a profitable activity. Vosper Thornycroft's activity was almost entirely in the latter category.

¹² On a 'willing buyer-willing seller' basis. During settlement negotiations, he produced an alternative valuation of £35.4 million on a 'public offer for sale' basis.

¹³ App. 9006/80.

¹⁴ App. 9265/81.

profitable, and in 1977 it made a profit of £825,000 on net assets valued at £2.2 million. The applicants claimed that fair compensation for the acquisition of Hall Russell at vesting day would have been £3.5 million (a figure that was eventually revised to £2.5–3.0 million). The Department gradually raised its offer to £1.5 million, a figure which was accepted in November 1980.

(iv) *English Electric Co.* and *Vickers plc* made an application¹⁵ relating to the nationalization of British Aircraft Corporation (BAC), a major aerospace manufacturer jointly owned by the two companies. BAC had shown a 700 per cent increase in pre-tax profits between 1972 and 1977, and the applicants claimed it was one of the most successful companies in the UK; by 1977, it was making pre-tax profits of £54 million on net assets of £80 million. The applicants estimated that its value at vesting day was £275 million; if the premium payable to acquire control of a company in a takeover bid were added, that figure was increased to at least £350 million.

The Government admitted that the company had shown 'spectacular' growth from 1973 to 1977, but made a preliminary offer of only £51 million, which was revised to £81 million in December 1978. The Stockholders' Representative and the Government adopted two fundamentally different approaches during the compensation negotiations. The Representative argued that the Minister had a discretion as to the amount of compensation he could award, and that only the Arbitration Tribunal was bound by the statutory formula; therefore valuation could be made as at vesting date. The Government, on the other hand, claimed that negotiations could be conducted only on the basis of the formula prescribed by the Act, so that a reference period valuation was mandatory. Its final offer of £95 million was accepted in August 1980 and the outstanding balance of £55 million was paid shortly afterwards.

(v) *Yarrow plc* and three of its shareholders (Sir Eric Yarrow, M & G Securities Ltd., and Mme Monique Augustin-Normand, a French national) introduced an application¹⁶ in respect of the nationalization of its wholly owned subsidiary, Yarrow (Shipbuilders) Ltd., a company engaged in building warships and other specialist vessels. The shares of the parent company were listed on the Stock Exchange. The subsidiary's annual pre-tax profits increased dramatically from £607,000 in 1972 to £7 million in 1974, then declined steadily to £3 million in 1977. An independent valuation of the company as at vesting day using two alternative methods put the value in the region of £16 million. The Department offered £2.8 million compensation; the Stockholders' Representative made an earnings-based valuation of the company during the reference period and arrived at a figure of £17.5 million. Further negotiations led to agreement in October 1980 on a compensation figure of

¹⁵ App. 9263/81.

¹⁶ App. 9266/81.

£6 million, and final payment of the balance of £3.75 million was made then.

(vi) *Vickers plc* registered a further application¹⁷ regarding a wholly owned subsidiary which was also nationalized, Vickers Shipbuilding Group Ltd., a company which (like Vosper Thorneycroft and Yarrow) specialized in the design and construction of warships. Annual pre-tax profits for Vickers Shipbuilding reached a peak of £5.5 million in 1974, and were never below £2 million per annum between 1972 and 1977. Vickers plc estimated that the value of its subsidiary at vesting day was £25 million. The Department initially offered £10.6 million while the Stockholders' Representative claimed almost twice that amount. The Government later increased its offer to £13.5 million, but the Stockholders' Representative was still not satisfied, and instituted proceedings before the Arbitration Tribunal. Written pleadings were exchanged and a hearing began in September 1980, but the parties eventually agreed on a figure of £14.45 million compensation.

(vii) Finally, three companies made an application¹⁸ relating to the nationalization of a shipbuilding company, Brooke Marine Ltd., which was jointly owned by them. The three companies were *Dowsett Securities Ltd.*, *FFI (UK Finance) plc* and *Prudential Assurance Co.* The Commission referred to the case as the Dowsett case,¹⁹ since that company owned almost three-quarters of the shares in Brooke Marine. Annual pre-tax profits of Brooke Marine increased steadily from £428,000 in 1973 to a peak of £865,000 in 1977, on net assets of £4.9 million. The Government made a first payment on account of £350,000. The Stockholders' Representative called this figure 'derisory' and later alleged that the report on which the Government was acting contained a substantial number of factual errors and important omissions, allegations which the Government denied. The Representative claimed compensation of £4.5 million; the Government made an offer of £806,000. The Government pointed out that the value of Brooke Marine during the reference period would have been adversely affected by the fact that the applicants had an option to convert their debenture stock into new shares by March 1976 (an option which was in fact exercised on that date). The existence of this option was not discussed further. A figure of £1.8 million was finally agreed upon in December 1980, and a final payment of £1.15 million was made shortly thereafter.

To summarize, the Government paid a total of £128 million to the seven nationalized companies, while the applicants claimed that the value of their companies at the vesting days totalled £455 million. Each of the applicants argued that the compensation they received was grossly

¹⁷ App. 9313/81.

¹⁸ App. 9405/81.

¹⁹ The Court, however, preferred to call it the Brooke Marine case.

inadequate and discriminatory and was thus in violation of Article 1 of Protocol No. 1 to the Convention (no deprivation of possessions except subject to conditions provided by law, etc.),²⁰ as well as of Article 14 of the Convention (no discrimination).²¹ Each of the applicants also alleged a breach of Article 6 of the Convention (expeditious and fair hearing by an independent and impartial tribunal),²² although the terms of their allegations differed slightly in this regard. Four of the applicants further alleged a breach of Article 13 (no effective remedy) while two applicants also invoked Articles 17 (destruction of rights and freedoms) and 18 (restrictions on rights are not to be applied for improper purposes).²³

III. PROCEDURE

Vosper plc introduced a preliminary application relating to the nationalization of Vosper Thorneycroft in September 1977, shortly after the vesting day, but, as the amount of compensation had not yet been agreed, the application was not registered until February 1981. Sir William Lithgow's application was introduced in May 1980 and registered shortly thereafter. The remaining cases, with the exception of the Dowsett case, were introduced and registered in February and March 1981. The Commission deliberated in May 1981 and, as requested by the petitioners, invited the Government to make written observations on the merits, as well as the admissibility, of the first six applications. The Dowsett case was introduced and registered the following month, and the Commission decided in December 1981 to invite the Government to submit observations on this case as well. The Government submitted its observations on all the applications in April and July of the following year, after the Commission had granted an extension of the time limit for doing so. The applicants' observations were received in July and September. The Commission considered procedural questions in July and October and decided to invite the parties to appear at a combined hearing. It also invited the Government to submit further observations on the admissibility of all the cases except the Vosper case. These observations, and the applicants' replies, were received in November and December 1982.

The hearing on admissibility and merits took place in January 1983; the applicants in the *James* case,²⁴ whose case raised some of the same issues with regard to Article 1 of the Protocol, joined in part of the oral hearings.²⁵

²⁰ Set out in full below at p. 44.

²¹ Set out in full below at p. 63.

²² Set out in full below at p. 68.

²³ All of these alleged breaches of the Convention are discussed further, below pp. 72-3.

²⁴ App. 8793/79.

²⁵ See case of *James and others*, Judgment of 21 February 1986, Series A, No. 98. In this case, the four trustees of the 2nd Duke of Westminster's will complained of the operation of the Leasehold Reform Act 1967, which granted tenants holding land on a long lease the right to purchase compulsorily the freehold of the houses they occupied. The 6th Duke owned a large number of

The Commission decided on admissibility on 28 January 1983, and held that all the applications were admissible except those made by the three individual shareholders in the claimant parent company of Yarrow (Shipbuilders) Ltd.

Article 25 (1) of the Convention states that 'The Commission may receive petitions . . . from any person, non-governmental organization or group of individuals claiming to be the victim of a violation . . . of the rights set forth in the Convention'. The Government contended²⁶ that the three shareholders in Yarrow plc (the parent company) were not 'victims' within the meaning of Article 25, since they did not own any shares in the nationalized company, Yarrow Shipbuilders; nor did they own a substantial proportion of the shares in the parent (none of them owned more than 10 per cent of the shares of Yarrow plc); nor could they be said to be indirect victims. The applicants contended that when a company was deprived of its possessions, its shareholders were therefore, by definition, also deprived and consequently became 'victims' within the meaning of Article 25. They argued that 'the proportion of the shareholding could only affect the operation of the principle if it was at a level that could be regarded as *de minimis*'.²⁷

The Commission held that the individual applicants had not themselves been deprived of their possessions; only the company in which they owned shares had been so deprived. Although the Commission had held in two previous cases²⁸ that a shareholder could claim to be a victim as regards measures directed against a company, those cases were distinguished on the grounds that the individual concerned owned a substantial majority shareholding in the company. None of the individual applicants in the Yarrow case had a controlling interest in Yarrow plc, and their applications were consequently declared inadmissible.

Since Yarrow plc was not defunct, this decision, although narrow, was perhaps correct on its facts in the light, in particular, of the *Barcelona*

properties in London affected by the Act, and he and his trustees alleged that he had been deprived of the ownership of those properties contrary to Article 1 of the Protocol, since they had been forced to sell the freeholds at prices below those prevailing in the open market. The applicants in the *James* case also made a number of other claims which, however well-presented, were inherently unattractive and destined to fail: such as, that the taking itself was unlawful since it was not in the 'public interest' to deprive property owners of their rights in the interests of a particular, allegedly disadvantaged, section of the community—their tenants. The fact that the Duke of Westminster is reputedly the wealthiest man in England (notwithstanding the deprivation of which he complained) might perhaps be regarded as an embarrassment when appearing before tribunals concerned with the protection of fundamental rights and freedoms. In the circumstances, we may surmise that it was not to the advantage of the present applicants to be yoked to his Grace, however much it may have assisted the Commission (and even to some extent the parties) for the common issues of law to be argued and decided at the same time.

²⁶ CR Appendix II: Admissibility Decisions, p. 145.

²⁷ *Ibid.*, p. 146.

²⁸ App. 1706/62, *X v. Austria* (1966), *Collection of Decisions of the European Commission of Human Rights* (hereinafter *Collection of Decisions*), vol. 21, p. 34; App. 7598/76, *Kaplan v. UK* (1980), *Decisions and Reports of the European Commission of Human Rights* (hereinafter *Decisions and Reports*), vol. 21, p. 5.

Traction case.²⁹ Had the decision on Article 25 gone differently, this could have been significant in view of the holding (below, section IV) that the customary international law rules relating to compensation for expropriation did not apply to a State's own nationals: Mme Augustin-Normand was a French citizen.

The main admissibility issues in all cases except Vosper's³⁰ concerned the exhaustion of domestic remedies and the 'six months rule'.³¹ Article 26 of the Convention provides that:

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

The Government submitted that if the terms of the Act itself were, as the applicants alleged, unfair, arbitrary and discriminatory, then their complaints arose as soon as the Act became law or, at latest, from the date when the Act operated to divest them of their shares. Thus, with the exception of the Vosper case, all the applications had been made outside the six-month time-limit. In so far as these six applicants also complained of the manner in which the statute had been applied, and in particular about the failure of the Secretary of State to exercise his alleged statutory discretion more fairly, the Government pleaded a failure to exhaust domestic remedies. It took the view that the Arbitration Tribunal constituted a 'domestic remedy'; since none of the Stockholders' Representatives had instituted and completed³² proceedings before the Arbitration Tribunal, this amounted to a failure to exhaust available remedies and this failure also bound the shareholders of the companies concerned. The Government argued that the applicants' view that the Tribunal was unlikely to award them any more compensation could not excuse their failure to resort to it, and relied on the fact that, in the two cases in which compensation was actually settled by arbitration,³³ the final award was substantially greater than the final offer made by the Secretary of State.

The Commission, relying on its decision in Application No. 7379/76,³⁴ held that the six-month period could only begin to run once there had been a final decision or some equivalent act or measure:

Article 26 cannot be interpreted so as to require the applicant to seize the Commission at any time before his position in connection with the matter complained of has been finally determined or settled on the domestic level.³⁵

²⁹ *Barcelona Traction, Light and Power Co. Ltd. (Second Phase)*, ICJ Reports, 1970, p. 3.

³⁰ Here, owing to the way the applicant had pleaded its case, there was essentially no dispute concerning compliance with Article 26, although the Government belatedly and unsuccessfully raised the question at the oral hearing.

³¹ The Commission devoted 247 pages to its decision on admissibility; only a brief summary can be given here.

³² Vickers had commenced proceedings, but settled.

³³ Those related to the shares of Scott Lithgow Drydocks Ltd. and Cammell Laird Shipbuilders Ltd.

³⁴ *X v. UK* (1976), *Decisions and Reports*, vol. 8, p. 211.

³⁵ Admissibility Decisions, p. 32; see also pp. 101, 131, 171, 206 and 244.

It rejected the Government's argument that the Act itself or the taking on vesting day amounted to a 'final decision': the Act did not itself determine the amount of compensation nor the speed with which it would be paid. The applicants' essential complaint was in respect of the quantum of compensation, the very thing that was left undetermined by the 1977 Act. Therefore each applicant was entitled 'to wait until the amount of compensation had been fixed under the statutory compensation procedures before bringing his complaints concerning compensation before the Commission'. The complaints were thus not out of time.

As regards the non-exhaustion of domestic remedies, the Commission held that the Arbitration Tribunal was a 'remedy', but not one which was 'effective and sufficient', an extra requirement developed in the case law of the Court.³⁶ The Arbitration Tribunal did not constitute such a remedy for several reasons: (i) the applicants did not have direct access to it—this factor was decisive in the *Lithgow* case, since the applicant was a minority shareholder and found himself bound by the decision of the other shareholders to accept the compensation offered by the Government; (ii) reference to the Tribunal could be made only 'in default of agreement', i.e. after negotiations had broken down, thereby further lengthening the process and preventing the prompt payment of compensation; (iii) the Tribunal had no jurisdiction over such matters as interest rates, payments on account and the use of the safeguarding provisions. The Commission agreed with the applicants' view that the Tribunal was not an appeal court—it was merely an alternative means of determining the amount of compensation which should be paid. Furthermore, the applicants had not acted unreasonably in not pursuing claims before the Tribunal, since there was no certainty that they would achieve more by doing so, and a real risk that they might be awarded less. The Commission thus—rightly, it is submitted—refused to accept the Government's 'Catch-22' argument, and held that the applications complied with Article 26 and could not be said to be 'manifestly ill-founded' under Article 27 (2). They were therefore declared admissible.³⁷

The Commission deliberated on the merits in March, May and October 1983 and decided to order joinder of the cases under Rule 29 of its Rules of Procedure. A friendly settlement could not be reached and the Commission's report was finally adopted in March 1984. It decided by a large majority that there had been no breach of the Convention.

Although in the past the Commission used to refer to the Court only cases in which it had upheld an application, in recent times it has also referred some cases in which it had reached a negative conclusion but considered that an issue of importance was involved. It believed this to be

³⁶ *Airey* case (1979), Series A, No. 32, p. 11; *Van Oosterwijck* case (1979), Series A, No. 40, pp. 13–14.

³⁷ The Government chose not to reopen these issues before the Court.

such a case, and in May 1984 it sent the dossiers up to the Court.³⁸ A chamber of seven judges was chosen on 22 May, but it immediately decided to relinquish jurisdiction in favour of the plenary Court. The Court requested the parties to submit memorials in June, and these were received in October and November. The Commission did not submit a written reply. Hearings were held in June 1985, and the decision was handed down on 8 July 1986, over nine years after the nationalization had taken place.

Having outlined the background and procedure, we are now in a position to examine in more detail the decisions on the main points on the merits, starting with the most important ones of all—the questions of entitlement to compensation and the standard of compensation.

IV. ENTITLEMENT TO COMPENSATION

Article 1 of Protocol No. 1 to the Convention states that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The applicants argued that this provision required the payment of fair compensation for the expropriation of property. They based their argument partly on the reference to 'general principles of international law' in Article 1 and partly on the notion of the 'fair balance' inherent in Article 1 developed (during the course of these proceedings) by the Commission and the Court. When the case began its lengthy passage through the Commission and the Court, the *Sporrong and Lönnroth*³⁹ case (in which these organs first recognized the 'fair balance' concept) had not yet been decided, so the applicants' only real line of attack appeared to be the 'international law' point; when the *Sporrong* applicants succeeded before the Court, the British applicants came to rely more and more on the concepts enunciated there.

They argued that the object of the requirement that any taking be in accordance with 'general principles of international law' was to ensure that nationals of contracting States were protected by the international standard of 'prompt, adequate and effective compensation' which applies to the expropriation of property owned by foreigners. The Government submitted that this requirement applied only to foreigners, for it is only in

³⁸ Cases Nos. 2/1984/74/112-118.

³⁹ *Sporrong and Lönnroth* case; Commission Report of 8 October 1980; Judgment of 23 September 1982, Series A, No. 52.

respect of the taking of aliens' property that the principles of customary international law apply. Indeed, the Government originally argued before the Commission that the inclusion of this oblique reference to the compensation rights of aliens positively supported its contention that nationals had no right at all to compensation for expropriation under the Convention—an argument which the Government later abandoned and which found no favour with the Commission.⁴⁰ The applicants, for their part, contended that there is nothing in the wording of Article 1 to warrant any distinction between nationals and non-nationals: the reference to 'general principles of international law' was a reference to a substantive standard, not a reference to the rules as to nationality of claims. They claimed that it would require 'clear and unequivocal language . . . to deny equal protection of the right of property to nationals and aliens'.⁴¹ In addition, the Government's interpretation of Article 1 would lead to results that were manifestly unreasonable in that no one except a foreigner would be entitled to compensation for expropriation, and such entitlement would therefore depend on the vagaries of municipal law rules governing nationality. It could also lead to discrimination based on nationality, because an alien stockholder in a company could be entitled to more compensation than a national.

In the *Gudmundsson* case⁴² the Commission had stated that general principles of international law do not apply to measures affecting a State's own nationals; other decisions reflected a similar view.⁴³ The applicants distinguished the *Gudmundsson* case on the grounds that the statement in question was not necessary to the decision; they also said it did not necessarily follow that because the relevant principles had evolved in the context of foreigners' property, they could not also be applied to the property of nationals within the context of the Convention; they further pointed out that, except for the *Andorfer Tonwerke* case,⁴⁴ the Commission had not applied the *Gudmundsson* approach since 1966, and referred to several subsequent cases in which the Commission had apparently decided not to take that approach.⁴⁵ Alternatively, they invited the Commission to depart from its previous case law.

There was a considerable dispute as to the relevance of the *travaux préparatoires* of the Convention in the interpretation of Article 1 of the Protocol. The applicants said they should not be resorted to, since the

⁴⁰ CR, para. 353.

⁴¹ *Ibid.*, para. 238. Compare the reference in Article 26 of the Convention to the 'domestic remedies rule'.

⁴² App. 511/59, *Gudmundsson v. Iceland*, *Collection of Decisions*, vol. 4, p. 1 at p. 19.

⁴³ App. 1870/63, *X v. Federal Republic of Germany*, *ibid.*, vol. 18, p. 54; App. 2303/64, *X v. Federal Republic of Germany*, *ibid.*, vol. 22, p. 12; App. 7987/77, *Andorfer Tonwerke v. Austria*, *Decisions and Reports*, vol. 18, p. 31 at pp. 47–8.

⁴⁴ See previous note.

⁴⁵ App. 3651/68, *X v. UK*, *Collection of Decisions*, vol. 31, p. 72; App. 5849/72, *Müller v. Austria*, *Decisions and Reports*, vol. 3, p. 25; App. 7059/75, *X v. Italy*, *ibid.*, vol. 6, p. 131; *Handyside* case, Report of the Commission, Series B, vol. 22, paras. 161–2.

meaning of Article 1 was clear, and therefore the situation fell within the 'ordinary rule' in Article 31 of the Vienna Convention on the Law of Treaties 1969.⁴⁶ Alternatively, even if recourse could be had to preparatory materials, these did not indicate an intention to exclude the right of nationals to obtain fair compensation; at best they were merely ambiguous on this question. The Government, on the other hand, argued that the *travaux préparatoires* should be used as a supplementary means of interpretation, either to confirm its interpretation, or to clarify any ambiguity or obscurity; it referred to Article 32 of the Vienna Convention.⁴⁷ The Government relied in particular on a statement prepared by the Secretariat-General of the Council of Europe in September 1951 which showed that disagreement between the contracting parties was the main reason why no right to compensation had been mentioned in Article 1; the statement read, in part: 'the phrase "subject to conditions provided for by . . . the general principles of international law" would guarantee compensation to foreigners, even if it were not paid to nationals'.⁴⁸

The Commission and the Court had no hesitation in referring to the *travaux préparatoires* of the Protocol, and both bodies concluded that they merely confirmed the view that Article 1 was not intended to extend the applicability of the principles of international law to cover the expropriation of the property of nationals. The Court referred in particular to a resolution of the Committee of Ministers of the Council of Europe when the Protocol was opened for signature, stating that 'the general principles of international law, in their present connotation, entail the obligation to pay compensation to non-nationals in cases of expropriation'.⁴⁹ This formula was approved in preference to an earlier proposal by the German Government that the general principles of international law entailed an obligation to 'pay compensation in cases of expropriation' (without expressly distinguishing between nationals and non-nationals). The Court therefore agreed with the Commission that this Resolution 'must be taken as a clear indication that the reference to the general principles of international law was not intended to extend to nationals'.⁵⁰ The Commission and the Court also agreed with the Government that such

⁴⁶ This reads (in part):

'(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

'(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made by one or more parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty . . .'

⁴⁷ 'Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

⁴⁸ *Collected Edition of the Travaux Préparatoires*, vol. 8, pp. 4-10.

⁴⁹ Res. (52) I of 19 March 1952.

⁵⁰ Judgment, para. 117.

subsequent practice as there was by the States parties to the Protocol tended to support its interpretation.⁵¹

On the question of the meaning of the text and context, the Commission accepted that the interpretation for which the applicants contended was a tenable one, in that the reference to 'general principles' could be read as incorporating substantive principles for the benefit of 'every person' entitled to the protection of the Convention. On the other hand, the provision could be read as incorporating only such obligations as are actually imposed on a State under general principles of international law, and not as extending such obligations to include persons who would not otherwise benefit from them. The Commission, in keeping with its decision in the *Gudmundsson* case, favoured the latter approach; thus the applicants could not claim the protection of international law, since international law applies only to acts done in relation to the property of aliens. The Commission acknowledged that it must be slow to interpret articles of the Convention as discriminating between different classes of people, but such discrimination is not expressly prohibited; indeed, Article 16 expressly allows a State to derogate from its obligations under Articles 10, 11 and 14 as regards the political activities of aliens.

The Court agreed with the Commission, holding that the purposes of this reference to international law were (i) to enable aliens to resort directly to the machinery of the Convention to enforce their rights under international law without having to rely on diplomatic protection; and (ii) to preclude any argument that Article 1 might derogate from aliens' pre-existing rights. Neither of these purposes justified the interpretation which the applicants sought to put upon Article 1. As regards the argument based on discrimination between alien and national shareholders, the Court pointed out that in the context of expropriation there might well be good reasons for distinguishing between nationals and aliens so far as compensation was concerned.⁵²

The decision on this point is certainly comprehensible and defensible. The *travaux préparatoires* are themselves somewhat ambiguous, but probably the draftsmen did not intend the reference to 'general principles of international law' to benefit nationals, bearing in mind, particularly, the strong opposition to such a provision, at the time of drafting, on the part of the UK Government and some others. It would have been a possible, but bold, step for the Commission or the Court to accord nationals a right to

⁵¹ *Ibid.*, para. 118. The Government had relied on the fact that, when Portugal acceded to the Convention with a declaration which seemed to reserve a right to nationalize without adequate compensation, the UK (*inter alia*) objected *so far as foreign nationals were concerned*. Article 31 (3) (b) of the Vienna Convention on the Law of Treaties 1969 declares that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' shall be taken into account in the interpretation of the treaty. The Commission and the Court left unexplored the interesting question of how far the subsequent practice of *States* (alone) ought to count when one is interpreting a treaty whose purpose is the protection of the rights of individuals against States; in such cases subsequent State practice could be self-serving.

⁵² Judgment, paras. 113-16.

compensation on the basis of such language; such a step was also rendered unnecessary once these bodies had accepted the applicants' interpretation and extension of the *Sporrong* principle to cases of taking (see immediately below). The interpretation adopted also had the considerable advantage that the two bodies were released from the necessity of expressing a view on a very controversial issue, namely, what in fact is the standard of compensation required by general international law?⁵³ It is therefore unsurprising that both tribunals preferred a more innovative, but less controversial, approach based on the meaning of the whole of Article 1, not just one phrase: the *Sporrong* principle.

The applicants in the *Sporrong and Lönnroth* case had complained of 'planning blight' over a long period in respect of land which they owned. The Swedish Government had granted the city of Stockholm expropriation permits accompanied by a prohibition on construction. In Mr *Sporrong's* case, the permit was originally granted in 1956, but was never acted upon; it was finally cancelled only in 1979, by which time Mr *Sporrong* had died. His estate brought the claim against the Swedish Government, alleging breaches of Article 1 and the other articles relied on by the applicants in this case. Mrs *Lönnroth* pleaded similar breaches, although the permit relating to her property had not been issued until 1971. The Commission, by 10 votes to 3, held that there had been no breach of Article 1.⁵⁴ The Court, however, held, by 10 votes to 9, that there had been such a breach, and ordered the payment of compensation. In a judgment delivered in September 1982, the Court concluded that the applicants had had to bear an excessive burden in the public interest, and such a burden could only be justified if they had had the possibility of seeking a reduction in the period of validity of the permits or of claiming compensation; neither of these options was available under Swedish law at that time, so there had been a violation of the applicants' right to the peaceful enjoyment of their possessions under Article 1.

Although in that case no deprivation of property had ever occurred, the present applicants stressed that the Court in *Sporrong* had seen its general role as 'to determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the individual's fundamental rights',⁵⁵ without reference to any particular sentence in Article 1. They interpreted the Court's approach as follows: (i) the first sentence is a 'general rule', and therefore the three safeguards in the second sentence must be read in conjunction with the first sentence; and (ii) the search for a 'fair balance' must be found by examining the structure of Article 1 as a whole. The applicants contended that this

⁵³ See, e.g., Schachter, *American Journal of International Law*, 78 (1984), p. 121; *ibid.* 79 (1985), p. 420; Mendelson, *ibid.* 79 (1985), pp. 414, 1041; American Law Institute, *Restatement of the Law: Foreign Relations of the United States (Revised)* (1986), section 712 and commentary; García-Amador, *The Changing Law of International Claims* (1984), chap. X.

⁵⁴ Commission Report of 8 October 1980, paras. 93-121.

⁵⁵ Judgment of 23 September 1982, Series A, No. 52, para. 69.

interpretation led to two requirements: (i) the aim of the interference must be to meet the needs of the general interest of the community; and (ii) the means used must be proportionate to the aim, with the payment of compensation normally being an essential means of reconciling the rights of public authorities and property owners. The applicants clearly fell within the terms of Article 1 since deprivation of property is the most serious form of interference with the enjoyment of one's possessions; they therefore contended that they, like the applicants in the *Sporrong* case, were entitled to compensation for their loss.⁵⁶

The Government tried to resist the extension of the *Sporrong* principle by stressing the Court's statement in that case that Article 1 comprised 'three distinct rules': the first rule (the first sentence) setting out the principle of peaceful enjoyment of property; the second rule (the second sentence) defining the conditions under which a *deprivation* of possessions is in accordance with Article 1; the third rule (the third sentence) recognizing that States are entitled to control the use of property in accordance with the general interest.⁵⁷ The Government submitted that there was no need to examine the first rule, provided the conditions specified by the second rule were satisfied; only if the second and third rules were inapplicable would it be appropriate to examine the first rule and decide whether a 'fair balance' had been struck. Here, the second rule was applicable and therefore the *Sporrong* principle was irrelevant.

On this important issue, the Commission agreed with the applicants, taking a slightly different approach to that taken by the Court in the *Sporrong* case. It observed that 'the three rules referred to by the Court are not entirely separate or watertight . . . The second and third rules must be interpreted in their context and in the light of the general guarantee contained in the first sentence.'⁵⁸ The Court, in essence, accepted this interpretation, saying that the three rules were not 'distinct' in the sense of being unconnected: the second and third rules were concerned with particular instances of interference with the right provided for in the first rule, and should therefore be construed in the light of the general principle enunciated in the first rule. The Court again stressed that 'the search for this balance is . . . reflected in the structure of Article 1 as a whole'.⁵⁹

What might be called the '*Sporrong* argument' became the applicants' main point on entitlement to compensation; but, in the alternative, and partly to re-emphasize some of the issues from a different angle, they also relied on the safeguards contained in the remainder of the second sentence of Article 1: 'except in the public interest and subject to the conditions provided for by law'.

As regards the taking being in the public interest, the applicants argued

⁵⁶ Unlike the *James* case, the applicants here did not challenge the taking itself.

⁵⁷ *Sporrong* case, Judgment, para. 61.

⁵⁸ CR, para. 351.

⁵⁹ Judgment, paras. 106 and 120.

that an expropriation for which grossly unfair compensation was paid could never be in the public interest: the intention was the unjust enrichment of the State. Furthermore, the manner of taking was not in the public interest here because it was unfairly discriminatory against growth companies, and the compensation paid was less favourable than that which had been paid to other property owners under previous nationalization statutes.⁶⁰

The Government argued that the legislation was in the public interest, for the reasons it had given when nationalization was first announced.⁶¹ It argued that a measure which had been properly debated and passed by a democratic legislature must be taken to be in the public interest.

In its Report,⁶² the Commission stressed the importance of the rule derived from the *Belgian Linguistic* case's interpretation of Article 14,⁶³ viz., that there must be a reasonable relationship of proportionality between the means employed and the aim to be achieved, noting that the Court in the *Sporrong* case had adopted a similar approach in its 'fair balance' test of whether the interference with property rights was in the legitimate public interest.⁶⁴ However, in deciding whether a certain measure was in the public interest the national authorities had a 'margin of appreciation'; and although it was subject to supervision by the Convention organs,⁶⁵ the margin had to be a wide one, in the opinion of the Commission, since any decision in this area would necessarily involve complex political, social and economic issues which were solely within the competence of the contracting States. The Commission therefore adopted a two-stage approach: first, one must ask whether the deprivation of property was effected in pursuance of a legitimate aim in the public interest; then one should ask whether the interference with the individual's rights was proportionate to the legitimate aim being pursued. A taking of property will violate Article 1 of the Protocol if it fails to satisfy either or both of these tests.

The Commission laid particular stress on two questions: (i) whether in all the circumstances an excessive burden had been imposed on the affected individual: the terms and conditions under which the property was taken (including the compensation terms) were relevant in answering this question; and (ii) the principles which normally prevail in democratic societies.⁶⁶ Having regard to these factors, the Commission concluded that:

a taking of property for a public purpose without payment of compensation reasonably related to its value would normally constitute a disproportionate

⁶⁰ For further details, see section VI, below.

⁶² CR, para. 368.

⁶⁴ Series A, No. 52, para. 69 (1982).

⁶⁵ *Handyside v. UK*, Judgment of 7 December 1976, Series A, No. 4, paras. 48-9.

⁶⁶ The applicants were able to rely on a good deal of material garnered from the constitutional and administrative law of, in particular, the States parties to the Convention.

⁶¹ See pp. 33-4 above.

⁶³ Judgment of 23 July 1968, Series A, No. 6, p. 34.

interference with the right of property which could not be considered justifiable under Article 1. Only if there were specific grounds based on legitimate considerations of 'public interest' for not paying such compensation, could such a taking be justified.⁶⁷

The Commission stressed, however, that many different factors might legitimately be considered by a government in making this decision, and it identified three: the nature of the policy objectives being pursued (such as whether the property was being taken as part of a major economic or social reform or for a particular public purpose), the nature of the property being taken, and the requirements of administrative efficiency. Once these important considerations were added to the other side of the scales, the formula changed to one in which there could be a violation of Article 1 through absence or insufficiency of compensation only if there was a 'real and substantial disproportion between the burden imposed on the individual and what could reasonably be considered justifiable in the light of the public interest objectives being pursued'.⁶⁸ The fact that aliens might have a greater right to compensation under the 'general principles of international law' did not disturb the Commission, which said there was clearly some degree of overlap between the general principles of international law and the other rules contained in Article 1.⁶⁹ The 'wide margin of appreciation' turned out, as we shall see (section V), to be the rock on which the applicants ultimately foundered.

Having succeeded before the Commission on the general principle of the right to fair compensation under the *Sporrong* rule, the applicants placed much less emphasis on the specific phrase 'public interest' before the Court, which was able to dismiss the point quite briefly.⁷⁰ Unlike the Commission, it did not feel it necessary to find that the public interest required the payment of compensation for any expropriation—this was inherent in Article 1 as a whole (the *Sporrong* point). The 'public interest' requirement merely related to the justification and the motives for the actual taking, and these had not been disputed by the applicants.

Under the terms of the second sentence of Article 1, any taking of property must also be 'subject to the conditions provided for by law'. The Government argued that the reference to 'law' meant only the domestic law of the nationalizing State, and nothing more; alternatively, a taking in accordance with a statute passed by a democratically elected Parliament after full debate must be considered to be in accordance with Convention standards of legality. The applicants, on the other hand, argued that this provision meant that a taking had to be in accordance with principles of legality and not arbitrary; thus if the taking was arbitrary in the sense that

⁶⁷ CR, para. 374.

⁶⁸ Ibid., para. 376. With respect, there appears to be an inconsistency between the holding that proportionality will normally require compensation reasonably related to the property's value, and the further holding that in view of the wide margin of appreciation given to governments, only a real and substantial disproportion would violate Article 1.

⁶⁹ CR, para. 377.

⁷⁰ Judgment, para. 109.

the compensation paid was not reasonably related to the value of the property, it was contrary to the Convention. Furthermore, the jurisprudence of the Commission and the Court had recognized that these words require more than mere conformity with domestic law. In the *Winterwerp* case⁷¹ the Court had stated, in discussing Article 5, that 'the domestic law must itself be in conformity with the Convention' and that 'no detention that is arbitrary can ever be regarded as lawful'.⁷² The present applicants argued that similar principles applied to interpret Article 1, and that therefore compensation terms which were 'arbitrary' would violate the Convention.

The Commission accepted the applicants' contention that the principles enunciated in the *Winterwerp* case were also relevant in the interpretation of Article 1, so that the terms and conditions laid down by domestic legislation must not be arbitrary. But the standard required to meet the test of non-arbitrariness was not a high one, so long as the terms and conditions of the nationalization were reasonably precise and 'in line with the Convention as a whole and with the particular purpose of the restriction on the right of property permitted by the second sentence of Article 1 in particular'.⁷³

The Court dealt with this point very briefly. Relying on its recent statements in the *Malone* case,⁷⁴ it held that compliance with this phrase required that there be adequately accessible and sufficiently precise domestic legal provisions; the applicants had not disputed the validity of the legislation on this ground. It agreed that 'the law' meant more than domestic law, but (rightly) found that the issues raised under this head were the same as the main issues and did not need to be treated separately.⁷⁵

The applicants having overcome the hurdle of persuading the Commission and the Court⁷⁶ that Article 1 of the Protocol gave them a right to fair compensation, the question then arose as to what precisely this entailed in the circumstances, bearing in mind the wide margin of discretion which, it was held, the Government enjoyed. The answer to this question necessitated an assessment of the techniques of valuation available to, and employed by, the Government.

V. VALUATION

The applicants attempted to argue that the relevant standard of compensation was that of 'prompt, adequate and effective' compensation

⁷¹ Judgment of 24 October 1979, Series A, No. 33, para. 45.

⁷² Ibid., para. 39.

⁷⁴ Judgment of 2 August 1984, Series A, No. 82, paras. 66-8.

⁷³ CR, para. 380.

⁷⁵ Judgment, para. 110.

⁷⁶ Judge Thor Vilhjálmsón dissented, saying that Article 1 did not embody a right to compensation. His reasons, given in his concurring opinion annexed to the Judgment in the *James* case (p. 37), were based on the *travaux préparatoires* and on the absence of express mention of compensation in Article 1.

espoused internationally by the respondent State itself amongst others; they argued that the compensation paid under the Act violated the first, and especially the second, of these requirements. Their definition of 'adequate' was that compensation should be paid on a willing seller-willing buyer valuation as at the date of taking, not on the value of the property at a much earlier period. Reliance was placed on a variety of sources, including State practice, the writings of publicists, and international judicial and arbitral decisions, including the well-known *obiter dictum* by the Permanent Court of International Justice in the *Chorzów Factory* case that the measure of compensation for a lawful taking should be 'the value of the undertaking at the moment of dispossession, plus interest to the date of payment'.⁷⁷ Reference was also made to various decisions of municipal courts, and especially to a recent decision of the French Conseil Constitutionnel in the *Bank Nationalization* case.⁷⁸ The facts of that case were strikingly similar to the present one, and the Conseil held that the constitutional standard of a 'just indemnity' had been violated by (*inter alia*) the use of a reference period too remote from the date of taking.⁷⁹ These precedents, in the applicants' submission, embodied the standards of fair valuation recognized in and by the liberal democracies, and particularly the parties to the Convention.

The Government retorted that the provisions of the Act and the way they were applied met the standard of fair compensation and (if relevant) the international law standard. It distinguished the *Chorzów Factory* case on the grounds that the judgment could not be read literally and was merely a prohibition on *post*-vesting day valuation. It also stressed the *obiter* nature of the Permanent Court's *dictum* since the *Chorzów* case was actually about a sudden and unlawful taking, not a lawful nationalization following extended Parliamentary proceedings.

Both the Government and the applicants agreed that general international law did not specify any exclusive method of valuation. They agreed that the technique adopted must be appropriate to the circumstances, but disagreed on the application of this principle to the facts. As we have seen, the Commission and the Court did not reach this issue, since they held that the reference to international law in Article 1 of the Protocol was inapplicable to nationals. This left the standard of compensation inherent in Article 1 of the Protocol, a standard which both bodies dubbed the standard of 'fair compensation'.⁸⁰

The applicants alleged that the compensation terms were in fact

⁷⁷ *Chorzów Factory (Claim for Indemnity) (Merits) case*, PCIJ, Series A, No. 17, p. 4 at pp. 46-7. See, on some aspects of this question, the materials referred to at p. 48 n. 53 above.

⁷⁸ *Journal officiel de la république française*, 17 January 1982, and corrigendum 19 January 1982.

⁷⁹ See Mendelson, 'International Law and the Valuation of Nationalized Shares: Two French Decisions', *International and Comparative Law Quarterly*, 34 (1985), p. 284.

⁸⁰ Whether this standard is the same as the international law standard was left unresolved. The applicants argued that the standards and techniques used in the international precedents, in so far as they aimed at fair compensation, could also be relied upon in applying the Convention standard.

extremely unfair, which Sir Keith Joseph had indeed admitted in Parliament in August 1980 when he said that 'We recognize that some previous owners . . . believe that the terms of the 1977 Act were grossly unfair to some of the companies and we share this view'.⁸¹ Two principal causes of unfairness were identified. The main one was the use of a single retroactive reference period of six months, terminating some three and a half years before the actual date on which the shares vested in the new corporations. The applicants did not dispute that a backdated reference period was often justified, when it was designed to protect shareholders from a fall in value of quoted shares—a common occurrence after it is announced that a company is to be nationalized. They argued, however, that the application of such a method was an *exception* to a general rule that the only temporal *datum* fair to both the expropriator and the expropriated was the date of taking; and the exception was designed to *protect* the former owner, not further to prejudice him. In this case backdating had operated to the applicants' prejudice, because the relevant three-and-a-half-year period was one characterized both by high growth in the nationalized companies (so that they were more valuable in 1977 than in 1973-4) and by high inflation (so that payment as of 1977 at 1973-4 values did not enable them to replace what they had lost by something of equal value). Furthermore, the use of such a method was inherently inappropriate in their particular cases since the companies concerned were not quoted on the Stock Exchange, and most of them were tightly controlled subsidiaries whose shares were not freely bought and sold. Thus a technique designed to compensate for 'blight' to quoted shares was unnecessary, and its employment in this case had caused only injustice to the applicants.

The use of a hypothetical Stock Exchange quotation as the exclusive method of valuation for unquoted shares was also criticized on other grounds. It was said to be an 'inappropriate and arbitrary method', since it did not make allowance for the fact that a substantial premium must normally be paid to acquire all the shares in a company, rather than just the small quantities usually bought and sold in the stock market. There were also no comparable quoted shares available in valuing the unquoted ones, since virtually none of the companies involved was listed on the Stock Exchange. A further criticism of the Government's valuation method was that Stock Exchange prices are influenced by external factors, and fluctuate for reasons unconnected with the value of a company's assets and earnings. The chosen reference period was in fact one in which Stock Exchange prices were adversely affected by such factors as the Arab-Israeli war (October 1973), widespread industrial action in the UK during the latter part of 1973, the introduction of a three-day working week in December 1973, and the start of a miners' strike in February 1974.

⁸¹ Written answer to the House of Commons; statement quoted in full at CR, para. 83, and above, p. 36.

The reasons used by the Government to justify its compensation formula also came under fire from the applicants. During Parliamentary debates on the Act, the Government had said that it took the risk of deterioration in value of some of the companies, so it was only fair that it should get the benefit of any improvement in other companies' fortunes. In other words, it was fair to deny full compensation to companies whose shares had increased in value, since those whose shares had declined in value would get more than fair compensation.⁸² The applicants' view that 'compensation cannot be denied to one merely because another receives a windfall'⁸³ must, it is submitted, surely be correct, though the Commission and the Court may have been right not to attach too much significance to what may have been ministerial rhetoric.

The previous British nationalization statutes were also referred to by the applicants.⁸⁴ They compared the 1977 Act to these earlier Acts which, they said, had produced fairer compensation, and particularly noted the following differences: previous Acts had used a choice of reference periods and a reference period closer to the vesting date; and in previous cases there had been sufficient comparable quoted shares to allow the hypothetical Stock Exchange valuation method to operate fairly and efficiently.

The applicants claimed that fair compensation here could be assessed only on a willing buyer-willing seller basis as at the date of taking, and said that the Government had expressly ignored this method during debates on the 1977 Act. They claimed that the Government could easily have changed the compensation terms during the Parliamentary proceedings, once it realized that the passage of the Bill would be a lengthy one; its failure to do so only widened the inevitable gap between the reference period and the date of taking, and the injustice flowing from that gap. The Government did in fact change its compensation terms in relation to Drypool Group Ltd., a company which became insolvent during the course of the debates and was consequently removed from the list of companies to be nationalized—the Government felt it could not justifiably pay that company's shareholders the full value the shares had had during the reference period. The argument that a change in the compensation terms would be unfair to those who had bought and sold shares after announcement of those terms⁸⁵ was said to be unfounded, since 'persons dealing in the relevant shares would have done so in the knowledge that the legislation might not be passed or that the terms might be amended'.⁸⁶

Each of the applicants endeavoured to show how the provisions in the Act had operated unfairly in its particular case.

⁸² Mr Gerald Kaufman, Minister of State for Industry, twenty-seventh sitting of the House of Commons Standing Committee, 4 March 1976.

⁸³ CR, para. 170. To say that the Government was taking the risk of a particular company's turning out to be unprofitable is one thing. To say 'What you lose on the swings, X will gain on the roundabouts' is another.

⁸⁴ See also the argument based on discrimination contrary to Article 14 (section VI, below).

⁸⁵ See statement by Sir Keith Joseph, quoted above (p. 36).

⁸⁶ CR, para. 173.

Vosper plc submitted a figure of £37.7 million as the value of Vosper Thorneycroft at vesting day, based on the willing seller-willing buyer method of valuation; the actual compensation paid (£5.3 million) was thus only one-seventh of the value of the company at vesting day (£37.7 million). The compensation was also only one-fifth of its net asset value (£25.6 million) and even less than its cash in hand at vesting day (£5.5 million). Vosper plc alleged that its subsidiary had been the most unfairly treated of all those companies nationalized under the Act, whether compensation as a percentage of profits or of net assets was used as the relevant measure.

The Government had also relied too heavily on section 38 (6) of the Act, in making the Stock Exchange valuation of the parent company the dominant or only factor in its valuation of Vosper Thorneycroft. Vosper plc alleged this was unfair for two reasons: (i) the price of the parent's shares had already been adversely affected by the threatened nationalization of its principal subsidiary, and (ii) its shares were sold in a very restricted market, since Vosper plc was itself a closely controlled subsidiary of David Brown Holdings Ltd., a private unlisted company.

The applicants in the *Dowsett* case relied on similar arguments to those used by Vosper plc (save for the section 38 (6) point). One unique factor in the Dowsett case was that profits of Brooke Marine had been adversely affected during the reference period by two unfavourable contracts which had engaged most of the company's resources. Claims under both contracts were not finally settled until September 1974. The existence of the applicants' options to convert their debenture stock would also have adversely affected any hypothetical value that shares in Brooke Marine might have had on the stock market during the reference period. Neither of these factors was operative at the vesting day. The Government replied by saying that the shareholders in Brooke Marine should have sought an amendment to the proposed compensation provisions in the Bill to deal with their unique problem. The Commission also dismissed the applicants' claim that the choice of reference period had been particularly unfavourable to them, saying that nationalization legislation could not be expected to provide each company with the reference period most favourable to it; it was inevitable that any chosen reference period would be more favourable to some companies than to others.⁸⁷

In the *Yarrow* case, as in the Vosper case, a parent company form of valuation had been adopted. The Government in that case determined the value of the subsidiary by taking the value of the parent company, then deducting a hypothetical figure for the parts of Yarrow plc which were not

⁸⁷ CR, para. 414. Ultimately the Court adopted the same approach and referred to its recently stated views in the *James* case (Judgment of 21 February 1986, Series A, No. 98, para. 68) to the effect that the single system chosen by Parliament to deal with the 1.25 million houses held on long leasehold in England and Wales (almost all of which were affected by the disputed legislation) could not be dismissed as 'irrational or inappropriate'. Given this finding, the applicants could not complain that their cases had not received individual consideration under the Act.

being nationalized. Yarrow alleged that this method bore no relation to the true value of Yarrow Shipbuilders: there were two separate dividend restraints imposed on the subsidiary, one as part of the safeguarding provisions of the Act, the other as part of a previous 'bailing-out' agreement with the Ministry of Defence. Both had an adverse effect on the dividends payable by the parent and thus affected the value of the parent's shares on the Stock Exchange.

Sir William Lithgow pointed out that the shareholders in Kincaid had settled their claim relatively early (in November 1979); if they had held out until mid-1980, they would probably have received an increased offer from the Government, as did the shareholders in all the other cases before the Commission—the procedure amounted in effect to a lottery. He also questioned whether the Government had in fact properly applied the criteria in the Act, since the end result was (as in the Vosper case) even less than the amount of cash held by the company at vesting day: £3.8 million compensation was paid for a company with assets of £4.9 million in cash. The applicant claimed he should have received £23.85 per share (a figure which the Government strongly disputed, but did not seek to disprove), rather than the £5.75 per share which he in fact received. Sir William also alleged that a further cause of injustice in his case was the fact that he paid an amount equivalent to 20 per cent of his compensation payment in capital gains tax, whereas corporate shareholders could 'roll over' their tax liability.⁸⁸

The applicants in the *British Aircraft* case used a different approach from that taken by Vosper and Dowsett: instead of arguing on the basis of compensation as a *proportion* of true value, they pointed out the *gross differential* between the two sums. This was hardly surprising, given that BAC was by far the largest of the nationalized companies: the applicants received £95 million compensation for a company with an estimated value of £350 million, a difference of £255 million. BAC, like Vosper Thornycroft, had shown a tremendous increase in profits during the relevant period, and it too alleged that the Act discriminated against shareholders in growth companies. Vosper summed up the case for both companies when it stated that:

The effect of choosing a reference period so far removed from the date of taking was *inevitably* that companies whose profits were on the upward trend did worse, while those whose profits were on a downward trend did better.⁸⁹

The applicants in the remaining cases (*Banstonian* and *Vickers*) relied on similar arguments.

The Government argued throughout that the compensation provisions in the 1977 Act were consistent with the Convention and therefore claimed that any figures produced by different valuation methods were irrelevant;

⁸⁸ For further details see under 'Discrimination', section VI, below.

⁸⁹ CR, para. 185.

thus, except for a few comments in individual cases, it refused to discuss the applicants' figures or their claims as to the value of the nationalized companies at the date of taking.

The Government's main point was that the compensation paid under the Act was indeed fair: 'What amounts to fair compensation is a question on which different minds can reach widely divergent conclusions'.⁹⁰ The points raised by the applicants had already been raised in Parliament: 'The Act represents the informed decision of a democratically elected Parliament on the very points now attacked by the applicants as "arbitrary"'.⁹⁰ The Government had considered and rejected a book value method of valuation, since it might be unreliable (owing to different accounting practices), and would have proved time-consuming and costly (as it had in the past). A hypothetical share valuation method was therefore chosen as being more expeditious and objective (as it would be based on the interaction of supply and demand forces in a free market). The Government had considered and rejected various objections made to the use of a share valuation method; in particular, (i) the fact that share prices were relatively depressed during the reference period did not justify the payment of any compensation in excess of current market value; and (ii) there should be no premium payable for acquiring control of a company since there was no valid analogy between a nationalization and a takeover bid.

As regards the problems associated with section 38 (6) of the Act, the Government pointed out that the valuation of the parent company was only one of the relevant factors to be taken into account under the Act, and only in situations where the nationalized company represented a very substantial part of the parent's business (e.g. 95 per cent in the Vosper case). The Commission and the Court agreed,⁹¹ saying it was not unreasonable to take this factor into account, 'as one factor along with all other relevant factors'. The valuation of the parent company would at least provide some evidence of the price that the stock market would probably have attached to the subsidiary.

In answer to criticisms of the specific reference period that was chosen, the Government made mention of the fact that share prices had suffered a sharp decline in the period after 28 February 1974; thus the reference period chosen was fairer than one ending in October 1974, when the Labour Party gained a majority in Parliament. In any case, industrial share prices were not much higher at the vesting days than they had been during the reference period.

Several of the applicants also complained about the delay involved, as regards both the gap between the reference period and the vesting days, as well as the gap between vesting days and the final payments of compensation. The Government responded by mentioning that shareholders

⁹⁰ CR, para. 202.

⁹¹ Ibid., para. 393; Judgment, para. 162.

continued to receive dividends (subject to the safeguarding provisions) up to vesting date. As regards the period after that date, negotiations proved to be more complicated than expected, and there had been no unreasonable delay on the Government's part. Payments on account were made to alleviate the effects of delay; overall these interim payments amounted to 46 per cent of the sums finally agreed. Interest was paid on compensation stock as from vesting day. The effects of inflation had been ignored because there was no correlation between share prices and changes in the overall price level, and to inflation-proof the shares of the nationalized companies would provide a benefit not available to shareholders in other companies.

The Commission, having concluded that the expropriation was in the public interest and 'provided for by law' within the meaning of Article 1, still had to consider whether an excessive and disproportionate burden had been imposed on the applicants. It stressed that the views of successive Governments as to the fairness or otherwise of the compensation terms were not decisive—the Commission had to make its own objective assessment of the facts, although it had to bear in mind that (as the Government argued) views might genuinely differ widely on whether a given set of compensation terms was fair or not.⁹²

In assessing the valuation method chosen by the Government, the Commission concluded that

apart from the question of the absence of allowance for a control premium, it does not appear . . . that the hypothetical Stock Exchange method of valuation in fact differed very greatly from the willing buyer/willing seller approach which the applicants maintain was appropriate.⁹³

Both methods relied on similar elements: a comparison with quoted shares was essential for both methods, and thus would have caused difficulties whichever method was used; the influence of external factors on stock market prices would also have been relevant to either method.

So far as concerned the choice of reference period, the Commission and the Court accepted the Government's submission that share prices during the reference period were not untypical: they were declining during that period, but only because they had reached a peak in mid-1972. Share prices continued to decline after the reference period, and reached a low in January 1975. Overall, the average price of shares during the reference period was little different from the average over the period between the reference period and vesting days.⁹⁴

The Commission also placed great stress on the fact that, as both parties agreed, in many circumstances it is necessary to make nationalizing legislation retroactive, at least in part, in order to protect the assets of the relevant companies from being dissipated between the announcement of nationalization and its actual occurrence. To this extent, it held, the

⁹² CR, para. 387.

⁹³ Ibid., para. 391.

⁹⁴ Ibid., para. 399; Judgment, para. 142.

businesses were in a sense brought under public control from the beginning of the nationalization process—although technically still private property, the applicants' ownership of the nationalized companies was subject to such severe restrictions (owing to the safeguarding provisions) that the 1977 Act 'retroactively brought the applicants' property to some extent into the public domain as from the end of the reference period'.⁹⁵ Thus the applicants could not argue that they had been deprived of the increase in value of their shares during that period. Their property rights had been frozen as at the end of the reference period; after that, the Government took the benefit and burden of any changes in value of the companies to be nationalized.

Following on from this 'public domain' argument, the Commission assumed that nationalization had effectively begun on 28 February 1974, so that the reference period was in fact very close to the start of the nationalization process. The Commission concluded, by 13 votes to 3, that the reference period and other criteria adopted by the 1977 Act were not incompatible with Article 1 of the Protocol. The majority recognized that the terms of the 1977 Act did in some cases produce a wide divergence between the value of the company as at vesting day and the amount of compensation paid. 'However, to a large extent the existence of such divergences reflects the fact that business conditions and prospects, and share values, can fluctuate rapidly.'⁹⁶ The method adopted, which froze the value of the companies during the reference period, was within the wide margin of appreciation afforded to the Government under Article 1.

Of the three members of the Commission who cast negative votes, two wrote dissenting opinions, and both criticized the majority's view that the companies had retrospectively vested in the Government as from the end of the reference period. Mr Ermacora, who dissented specifically on the Vosper case, said that the Commission had erred in choosing 28 February 1974 as the date when the nationalization process began; he preferred to see nationalization not as a political process, but as a legal event: 'the relevant legal date for a nationalization is . . . the moment when legal consequences came into effect as a result of legislation',⁹⁷ i.e. the date when the Act came into force. The period before 17 March 1977 was therefore legally irrelevant, and the adequacy of the compensation had to be assessed as at the date of enactment; on this basis, the compensation paid to Vosper plc, at least, was in violation of Article 1.

Mr Jorundsson dissented on a wider basis, and essentially agreed with the applicants' submission that 'compensation must in general reflect the value of the property at the day of taking'. Although it was permissible to assess property values at an earlier date in order to protect former owners, this device could not be used if there was no allowance for the increased value of the property—'the rules of the 1977 Act on compensation were

⁹⁵ CR, para. 408.

⁹⁶ *Ibid.*, para. 421.

⁹⁷ *Ibid.*, p. 142.

in this respect made inflexible without sufficient justification'.⁹⁸ He, too, questioned the validity of the Commission's 'public domain' argument, but preferred to use the vesting day as the relevant date of transfer into public ownership. On this basis, the compensation terms were wrong in principle and unsatisfactory in practice.

When they reached the Court, the applicants thus had to contend, not only with what we might call the Government's *à la carte* approach to techniques of valuation (wide margin of discretion, lawfulness of a combination of recognized methods), but also with a submission by the Commission that the reference period was not really so distant from the date of taking as it appeared, because of the 'public domain' theory. Whilst there is something in the point, it is respectfully submitted that it is ultimately unconvincing: as a matter of law and as a matter of fact the owners of the shares remained the owners—and not just in form—until the date of the Royal Assent, if not later. The applicants refuted the Commission's approach vigorously and in detail in the pleadings and oral argument; at the Court hearing, the Government largely passed it over in tactful silence, and so did the judgment. The Government, however, won the day on the *à la carte* approach. By 13 votes to 5, the Court agreed with the Commission that the hypothetical Stock Exchange value and the backdated reference period were well-recognized techniques, and that the Government was entitled to employ them in the exercise of its wide margin of discretion.

With the greatest respect, the majority of the Commission and the Court may not have grappled sufficiently thoroughly with the real issue. Whilst either of two medicines (or to pursue the gastronomic metaphor, two foods or beverages) may be harmless or even beneficial when taken alone, they may not have so mild an effect when taken in combination. Thus, to evaluate separately the acceptability of the two main elements in the valuation (the hypothetical Stock Exchange value and the backdated reference period), without fully considering the necessity and effects of their combination, was unfortunate. Whilst the Government, the Commission and the Court made much of the fact that a backdated reference period is a recognized technique, relatively little attention was paid to the fact that backdating in order to avoid 'nationalization blight' may be less necessary when the shares are unquoted and, instead of protecting the former owner—which is the purpose of backdating—may harm him.

The Court did advert to the applicants' assertion that the value of their shares had not in fact been adversely affected by the threat of nationalization.⁹⁹ It refused them the benefit of hindsight and said that, at the time the legislation was being prepared, the Government could not discount the risk of such distortion; it did not, however, quote any evidence in support of this. More importantly, under a hypothetical stock market valuation

⁹⁸ Ibid., pp. 144–5.

⁹⁹ Judgment, para. 132.

method, the effect of blight could have been allowed for *without* backdating. Whereas backdating may be necessary to avoid the effect of 'blight' when *actual quoted prices* are being used, in making a *hypothetical* Stock Exchange valuation, the valuer can be instructed to disregard certain factors or events.¹⁰⁰

Much was also made of the convenience of the Stock Exchange method of valuation; but, as the Court itself pointed out, there was little difference between the method of valuation espoused by the applicants and that laid down by the Act—except for the choice of reference period. Given that valuation discussions did not begin until after vesting day, it is hard to see how a vesting-day basis of valuation would have been so much more inconvenient than the one actually adopted.¹⁰¹

Five judges¹⁰² disagreed with the majority's view of the reference period, and consequently held that there had been a violation of Article 1 of the Protocol in that allowance was not made for changes in the profitability of particular companies between 1974 and 1977. They stressed the long interval between the reference period and vesting day, and the absence of any adjustment mechanism in the 1977 Act whereby the compensation terms could be amended. This absence amounted to a violation of the Protocol *per se*, but when the Act was applied in practice, this became even more clear: subsequent developments, at least in the Lithgow, Vosper and Dowsett cases, meant that the prolongation of the interval created an 'unreasonable and disproportionate distortion', even allowing for the wide margin of appreciation enjoyed by governments in this area.

With respect to the argument based on delay in the payment of compensation, the Commission held that the delay involved in the passing and implementation of the Act did not, of itself, render the compensation terms in violation of Article 1, if they were otherwise compatible with that provision. The delay prior to vesting day was only such as was inherent in the democratic legislative process; and the delay after that date was inevitable, given the complex nature of the compensation process. In any event, the delay had been adequately compensated for by the payment, backdated to vesting day, of a reasonable rate of interest (at a rate close to the average of the Bank of England minimum lending rate during that period), as well as by the use of unconditional interim payments on account. By the time the issue came to be heard by the Court, only Vickers

¹⁰⁰ An analogy is the instruction to Rent Officers to disregard the effects of scarcity in assessing fair rents under the Rent Acts.

¹⁰¹ The Court also dismissed the applicants' complaint that they received no premium for control with rather fuller reasoning (Judgment, paras. 148–50) than the Commission (CR, para. 390). It said that nationalization was not comparable to a takeover bid or a sale by private treaty; for one thing, it was not necessarily the case that a buyer could have been found for the large blocks of shares in question. Also, the Government was entitled to refuse to treat shareholders differently, according to whether or not they held a controlling interest.

¹⁰² Judges Bindschedler-Robert, Gölcüklü, Pinheiro Farinha, Pettiti and Spielmann; Judgment, pp. 70–1.

continued to press this complaint, and the Court rejected it for reasons very similar to those used by the Commission.¹⁰³

Several of the applicants complained that the safeguarding provisions of the Act amounted to deprivation of the profits they had been forced to retain, but only the BAC shareholders pursued this argument before the Court. BAC, as the largest company to be nationalized, was obviously the most affected by the operation of these provisions (at least in quantitative terms)—it had been forced to retain £44 million profit, and £19.7 million had been deducted from the 'base value' of its shares because of a large dividend payment in 1975. The Commission once again relied on its 'public domain' argument: the scheme of the Act was that, as from the end of the reference period, the companies should no longer operate exclusively for the benefit of their private owners, who did, in any case, receive a modest return on their investment until vesting day. The Court agreed with the Commission's conclusion, though it did, perhaps, impliedly doubt its grounds. It held that the safeguarding provisions were not unreasonable in principle, and neither was their effect in limiting dividend payments to the amount paid immediately before the reference period:

Ensuring continuity of dividend levels in this way is consonant with the notion that any growth in the fortunes of a nationalized company after the reference period should accrue to the benefit of the public sector just as that sector bore the risk of any decline.¹⁰⁴

Apart from the five-judge dissent on the reference period and the absence of corrective machinery, all of the applicants' other claims under Article 1 of the Protocol were rejected by a vote of 17 to 1.¹⁰⁵

VI. DISCRIMINATION

Article 14 of the Convention declares that

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The applicants submitted that this article, when read in conjunction with Article 1 of the Protocol, imposed an obligation upon an expropriating State which decided to pay compensation to do so fairly and without discrimination. They referred in particular to the *Belgian Linguistic* case¹⁰⁶

¹⁰³ CR, paras. 407 and 419; Judgment, paras. 167-9.

¹⁰⁴ Judgment, paras. 164-6; cf. CR, paras. 415-18.

¹⁰⁵ The *dispositif* does not identify the one, but Judge Pettiti, as well as participating in the joint dissenting opinion, wrote his own dissent on Article 1 of the Protocol and Articles 6 and 13 of the Convention (Judgment, pp. 74-6). It is not easy to determine exactly what were the learned judge's further disagreements on Article 1, but he would seem to have considered that something like the 'traditional' international law standard of 'prompt, adequate and effective' compensation applied here, but had not been met.

¹⁰⁶ Judgment of 23 July 1968, Series A, No. 6.

and the *East African Asians* case,¹⁰⁷ and stated that two principles could be derived from these cases: (i) in the absence of 'objective and reasonable justification',¹⁰⁸ like cases cannot be treated differently, and unlike cases cannot be dealt with as if they were similar; and (ii) a provision which is neutral on its face may nevertheless operate in a discriminatory manner and therefore be unlawful. The applicants emphasized the Government's admitted knowledge, during the course of the Bill through Parliament, of the fact that shareholders in growth companies would be compensated less favourably than the owners of companies which were not so profitable.¹⁰⁹

The Government accepted the importance of the requirement stated in the *Belgian Linguistic* case that discriminatory treatment is contrary to the Convention if it lacks 'objective and reasonable justification'. However, it said that the purpose of Article 14 was to prevent discriminatory treatment and not to produce complete equality of result. The applicants could not compare their position to that of persons affected by compulsory purchase legislation, or by previous nationalization measures, because 'the result . . . would be that a legislature could never adopt a statutory compensation formula without the risk of being found guilty of discriminatory treatment in not following an earlier precedent which would have produced higher compensation'.¹¹⁰ There was no single correct method of nationalization applicable in all cases of nationalization and, *a fortiori*, the same compensation terms could not be applied to the nationalization of a company as to the compulsory purchase of land.

The Court¹¹¹ accepted the relevance of the *Belgian Linguistic* case, but referred in addition to its recent *Rasmussen* judgment, in which, whilst reaffirming the need for an 'objective and reasonable justification', it also stressed that the State enjoys a certain margin of appreciation, the scope of which will vary according to the circumstances and the subject-matter.¹¹² The Court then proceeded to examine the extensive submission made by the applicants as regards the ways in which they felt they had been discriminated against.¹¹³

The applicants in the *Vosper* and *Dowsett* cases alleged *inter alia*¹¹⁴ that the Act had wrongfully discriminated between the companies nationalized in 1977. Although profitable and unprofitable businesses were unlike, they were treated alike by the application of an inappropriate single reference period. The consequence of this was that profitable companies suffered a much greater loss on the compensation terms than did the unprofitable ones.¹¹⁵ Vosper alleged that it had been the most unfairly treated of all

¹⁰⁷ Apps. 4403/70, etc., against UK, Commission Report of 5 March 1974, *Yearbook of the European Convention on Human Rights*, vol. 13, p. 928.

¹⁰⁸ *Belgian Linguistic* case, Series A, No. 6, p. 34.

¹⁰⁹ See p. 55 above.

¹¹⁰ CR, para. 292.

¹¹¹ On Article 14 the Court generally agreed with the Commission's conclusions: CR, paras. 425-45.

¹¹² Judgment of 28 November 1984, Series A, No. 87, paras. 35, 38 and 40.

¹¹³ Judgment, paras. 178-90.

¹¹⁴ For other allegations of discrimination, see below pp. 66-7.

¹¹⁵ Banstonian Co. also relied on this argument with respect to the nationalization of Hall Russell.

those companies affected by the Act, in that the ratio of compensation to earnings for Vosper Thorneycroft was by far the lowest of any of the nationalized companies. The applicants in the Dowsett case further alleged they had been discriminated against because the value of Brooke Marine's shares had been adversely affected during the reference period, for the reasons outlined above (see section V). The Government had failed to show that there was an objective and reasonable justification for these disparities.

As regards discrimination between companies affected by the 1977 Act, the Government submitted that the purpose of Article 14 was not to secure equality of result but merely to preclude discriminatory measures. In any case, the Government argued that the Act did not give rise to any such differential treatment, and was not arbitrary, since it required each company to be separately valued, taking all relevant circumstances into account.

The Court, having already found that the choice of the reference period was based on reasonable grounds, so that the exclusion of subsequent developments was also justified, assumed that any difference resulting from similar treatment of unlike companies must, by definition, have had an 'objective and reasonable justification', and left it at that.¹¹⁶

Sir William Lithgow had two main complaints of discrimination in comparison to other takings under the Act. The first related to the fact that he had had to pay capital gains tax when he disposed of or redeemed his compensation stock. Corporate shareholders, on the other hand, were protected by section 54 of the Finance Act 1976, which stated that any *company* which owned more than 75 per cent of the shares of a subsidiary, and which replaced its compensation stock with new business assets, was entitled to 'roll-over' relief, i.e. tax liability would be deferred until the new business assets were ultimately disposed of. The applicant alleged that this difference in treatment between individual and corporate shareholders was discriminatory and in breach of Article 14. The Government opposed this argument by stating that the Commission's case law¹¹⁷ showed that distinctions in the field of taxation do not necessarily give rise to an issue under Article 14. The Commission and the Court decided the issue on the simple basis that a 28 per cent shareholding (which is what *Sir William* had) would not have qualified for tax relief even if the owner had been a company.¹¹⁸

Sir William's second complaint related to the Government's use of an earnings-based valuation for growing companies and an assets-based one for companies in decline—he claimed that this amounted to discrimination against him, since an asset basis of valuation would have suited him. The Court, however, observed that the Stockholders' Representative

¹¹⁶ Judgment, paras. 182–3. See also below, pp. 67–8.

¹¹⁷ App. 8531/79, *A, B, C and D v. UK*, *Decisions and Reports*, vol. 23, p. 203.

¹¹⁸ CR, paras. 441–4; Judgment, paras. 178–9.

could have gone to arbitration if he thought the technique inappropriate. It was also undisturbed by the fact that the statutory formula contained an 'element of flexibility which could and did result in its being applied differently to different companies . . . [since] this enabled account to be taken of dissimilarities between them'.¹¹⁹

Yarrow plc submitted that it had been discriminated against by virtue of the parent company method being used to value its subsidiary's shares.¹²⁰ It claimed that the method was discriminatory since shares in other unquoted companies had been valued using other means, specifically an earnings-based approach. The Government argued that the provisions of section 38 (6) were objectively and reasonably justified, since the parent company valuation was only one of the relevant factors to be taken into consideration when valuing the subsidiary. *Yarrow plc* could not compare itself to other parent companies whose subsidiaries formed a much smaller part of the parent's business.

In relation to the complaints made in the *Lithgow* and *Yarrow* cases about the operation of the compensation terms, the Commission stressed that although the same global method of valuation (the hypothetical Stock Exchange price) had been used for all companies, the particular means used in each case by the Government to arrive at its final offer were not binding on the Stockholders' Representatives, since they could always resort to arbitration; they were, in any case, not determined unilaterally, but negotiated with the Representatives. The Court essentially agreed, and held that differences in the exact treatment of each company did not amount to a violation of Article 14.¹²¹ In any event, the use of a parent company-related valuation for *Yarrow Shipbuilders* was justified in providing a 'more appropriate and less artificial' method of valuation of an undertaking which constituted a substantial part of the quoted company's business.

As regards the allegation that applicants had been discriminated against, relative to persons affected by *previous* nationalization measures (a case of treating like cases unlike), the Commission simply stated that any such discrimination was not based on the 'status' of the persons affected and arose 'from differences between a number of Acts, passed and applied at widely separate points of time, for the purposes of taking specific industries into public ownership'.¹²² The applicants could not be said to be in a sufficiently comparable situation to those affected by previous Acts, in order for Article 14 to apply: it could not be interpreted so as to impose on States an obligation always to follow the same compensation method in each nationalization statute; a method 'cannot be held to infringe Article 14 merely because another more favourable method has been used on

¹¹⁹ Judgment, paras. 180-1.

¹²⁰ See p. 36 above. *Vesper plc*, the other applicant affected by a parent company valuation, did not allege discrimination on this basis.

¹²¹ CR, para. 432; Judgment, paras. 181 and 184-5.

¹²² CR, para. 435.

some occasion in the past'.¹²³ The Commission did not make it clear exactly why the cases were not sufficiently comparable. The Court did not elaborate on this point, but simply held that 'The Parliaments of the Contracting States must in principle remain free to adopt new laws based on a fresh approach'¹²⁴ and that no issue under Article 14 arose.

Vosper and Dowsett's complaint that the 1977 Act resulted in a less favourable measure of compensation than that provided for in compulsory purchase legislation (another instance of treating like cases unlike) was also dismissed by the Commission and the Court, on the ground that the general compulsory purchase legislation performed a different function from that performed by specific nationalization statutes; the circumstances covered by the two Acts were not sufficiently analogous to give rise to any issue under Article 14. In particular,

The valuation of major industrial enterprises for the purpose of nationalizing a whole industry is in itself a far more complex operation than, for instance, the valuation of land compulsorily acquired and normally calls for specific legislation applied across the board . . .¹²⁵

The Court unanimously concluded that there had been no breach of any of the applicants' rights under Article 14 of the Convention.

It will be observed that all of the forms of discrimination complained of by the various applicants were also said by them to be instances of arbitrary treatment and the cause of unfair compensation in connection with Article 1 of the Protocol. To the extent that any treatment of a person is (unjustifiably) discriminatory, it is, it seems, *ipso facto* arbitrary, so that—in the present context—the success of any claim under Article 14 presumably would have meant success under the Protocol. Conversely, to the extent that the differences of treatment or result were found to have an objective and reasonable justification under the Protocol, the same finding would have been fatal to claims under Article 14. Once the applicants had succeeded in establishing their right to fair (i.e. non-arbitrary) compensation under the Protocol (via the *Sporrong* point), the claims under Article 14 became superfluous, and were retained mainly as a forensic means of re-emphasizing the alleged unfairness of the compensation terms.

What the Court did not, in the event, have to come to grips with, then, was the difficult problem of indirect discrimination. To treat unlike cases alike with a discriminatory aim is clearly unlawful (absent a reasonable and objective justification), and this the Court and Commission accepted. On the other hand, the mere fact that the same law has a different impact on people differently placed presumably cannot itself constitute discrimination. But what of the intermediate position, where the legislature does not positively intend the discriminatory effect, but is nevertheless clearly warned of it and refuses to change course? The doctrine that one must be

¹²³ Ibid., para. 436.

¹²⁴ Judgment, para. 187.

¹²⁵ Ibid., paras. 121 and 188-9; CR, paras. 438-9.

taken to intend the foreseeable (and foreseen) consequences of one's acts may perhaps suggest that, as a matter of principle, such intermediate cases should be assimilated at least in part to cases of discriminatory aim, with the result that the Government would at any rate bear the burden of proving the existence of an objective and reasonable justification. This is a difficult question, and full elucidation has yet to emerge from Strasbourg.

VII. FAIR AND SPEEDY DETERMINATION

All the applicants also claimed that the Government had breached Article 6 (1) of the Convention, which reads (in part):

In the determination of his civil rights . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

It was not disputed that the applicants' civil rights were involved. The submissions of the applicants varied, but can be summarized under four main heads: (i) delay in determining the amount of compensation; (ii) whether the Arbitration Tribunal established under the Act was in fact an 'independent and impartial tribunal'; (iii) the scope of the Tribunal's jurisdiction: and (iv) the absence of access to the Tribunal for individual shareholders.

(i) Before the Commission, four of the applicants (*Lithgow, Vosper, Yarrow* and *Dowsett*) alleged that the delay in determining the amount of compensation was so great as to amount to a breach of the stipulation in Article 6 (1) that any determination of civil rights must be made within a 'reasonable time'. Since the Act was effectively backdated as regards the quantum of compensation, in determining how much time the Government had taken before it made its final offer one should also look at the time before vesting day to decide whether there had been a violation of Article 6 (1). The applicants in the *Vosper* and *Dowsett* cases claimed time should run from the start of the nationalization process, i.e. the end of the reference period; *Yarrow plc* claimed 31 July 1974 should be the start of the relevant period, since that was the date of the Government's formal announcement of its intention to nationalize the shipbuilding industry.

Vosper, in particular, stressed the issue of delay, and claimed it had accepted the Government's final offer of compensation (in September 1980) partly because it knew that any arbitration proceedings would only prolong, by up to two years, the delay which it had already suffered. *Vosper* argued that negotiation was effectively a condition precedent to the initiation of arbitration proceedings, so that the Government's unreasonable delay meant the postponement of the applicants' access to the Arbitration Tribunal. In other words, undue delay in reaching the point (breakdown of negotiations) at which the Stockholders' Representative could have gone to arbitration impeded the right of access to a tribunal,

and postponed the earliest time at which an award could have been handed down.

The Government conceded that Article 6 (1) applied to the fixing of compensation by a tribunal, but disputed whether there was in fact any relevant 'determination' to which the article could apply. There could be no dispute to be 'determined' unless there was a disagreement between the Secretary of State and the Stockholders' Representative; and since none of the present applicants' cases had in the event been referred to the Arbitration Tribunal (the only body which could determine any such dispute), Article 6 (1) could not be said to apply.

The Commission, too, disagreed with the applicants' contention that time began to run before the 1977 Act was passed into law. Although the Court had held in two cases¹²⁶ that a 'reasonable time' might begin to run from the start of preliminary administrative proceedings, this approach could not be extended to a situation in which the applicants' civil rights did not arise for determination until the Act creating those rights was passed. As to the period after the passing of the 1977 Act, there was not at any time any formal bar to the initiation of arbitration proceedings.¹²⁷ Moreover, after the Royal Assent there was no unreasonable delay on the part of the Government:

Having regard to the complexity of the issues involved and the number of cases which had to be investigated, the Commission does not consider that the period taken to open substantive negotiations in each case was unreasonably long.

The Commission implied that after negotiations had begun the Stockholders' Representatives were at least partly to blame for the resulting delay, and could have taken their cases to arbitration at any time.

By the time the case came to be heard by the Court, most applicants had largely abandoned this point, save in the event of the Court's sharing the Commission's holding that the property had to a certain extent passed into the public domain before vesting day. The Court confined itself to rejecting the claims on the ground that time never began to run, since there never was a reference to arbitration (save in the Vickers case where there was a fairly swift settlement).¹²⁸

(ii) The applicants in the *Banstonian* case submitted that the Arbitration Tribunal established by section 42 of the Act was set up for a specific and limited purpose and therefore was an 'extraordinary court'. They argued that Article 6 refers only to established courts of general or specialized jurisdiction; the Arbitration Tribunal, being an *ad hoc* creation to deal with a very limited issue, was therefore, by definition, outside the scope of Article 6. In addition, two members of the three-person Tribunal

¹²⁶ *Golder* case, Judgment of 21 February 1975, Series A, No. 18; *König* case, Judgment of 28 June 1978, Series A, No. 27, p. 33; see also *Andorfer Tonwerke v. Austria*, Commission Report of 8 March 1982, para. 75.

¹²⁷ CR, paras. 464-9.

¹²⁸ Judgment, paras. 198-9.

were appointed by the Secretary of State,¹²⁹ who was a party to any proceedings before the Tribunal. Furthermore, section 42 (5) of the Act specified that the tribunal members held office only 'for such periods as may be determined at the time of their respective appointments', and were subject to the possibility that the person who appointed them could 'declare the office of that member vacant on the ground that he is unfit to continue in his office'. Whilst not impugning the personal integrity or impartiality of the members of the Tribunal, the applicants alleged that these facts showed that the Tribunal was not 'impartial and independent' within the meaning of the Act.

The submission on impartiality received no sympathy from the Commission and Court, which stressed that nominations by the Secretary of State could not be made without prior consultation with the Stockholders' Representatives, and that criteria for the selection of suitable members were in fact worked out in consultation with them, and were designed to ensure impartiality.¹³⁰ On the other hand, a few judges were disturbed by the fact that the ordinary courts had no jurisdiction, as we shall see.¹³¹

(iii) *English Electric* and *Vickers plc* contended that the Arbitration Tribunal was constrained by the statutory compensation formula and so there was no tribunal available to them which could award compensation beyond those limits, in accordance with the alleged Convention standard. The Commission held that Article 6 was merely concerned with the determination of disputes arising under *domestic* law, and did not confer any substantive right to compensation; thus the only 'civil right' which the applicants had was to compensation on the basis of the 1977 Act.¹³² The argument was not pursued before the Court.

(iv) Finally, under Article 6, *Sir William Lithgow* alleged that he had been denied the right to a fair and public hearing before a tribunal, since compensation had been agreed by the Stockholders' Representative without his concurrence, and without reference to the Arbitration Tribunal. He alleged that dissatisfied shareholders should have had the right to initiate proceedings in relation to their own shareholdings, a right which was denied by the Act, since only the Representative could bring a case to the Arbitration Tribunal. Although it was no doubt more convenient for the Representative to act on behalf of all the shareholders, the applicant's right under the Convention could not be denied on the grounds of administrative convenience alone. Furthermore, the Stockholders' Representative was not really a 'representative' at all, since he could act independently of the shareholders in agreeing compensation.

The Government contended that it was essential that the shareholders' interests be collectively represented, otherwise the valuation process

¹²⁹ Section 42 (3) of the Act.

¹³¹ Below, p. 71.

¹³⁰ CR, paras. 456-63; Judgment, paras. 200-2.

¹³² CR, para. 472.

would have been unworkable. It relied on the *Golder* case¹³³ as showing that the right of access to a court is not an absolute one and may be subject to implied procedural limitations as well as to limitations on the content of the right itself: the Representative had a right of access to a court, and he had been appointed by the shareholders to represent their interests.

The Commission and a majority of the Court¹³⁴ held that the limitations imposed by the Act on the rights of individual shareholders were justified 'by the obvious need in circumstances of this kind to avoid a multiplicity of individual claims, which could lead to the same shares being valued differently in different ways'.¹³⁵ The only personal right which each shareholder had was to receive his share of the compensation due to the former shareholders collectively; thus the applicant had no personal right to bring his claim before the Tribunal.

Conformity with Article 6 (1) was the subject of much disagreement in the Court, with a separate opinion by two judges, and two joint dissenting opinions, each by two judges. Judge Lagergren (with whom Judge Macdonald agreed) held that the applicants' normal right of access to the ordinary courts in order to defend their proprietary rights had been abruptly taken away when the Act was passed, that the courts had not even been given jurisdiction over the content of the statutory compensation provisions and that this was 'premature and unacceptable and was not consistent with a fair interpretation of Article 6 of the Convention'.¹³⁶ However, in deference to the Court's earlier decision on a similar point in the *James* case,¹³⁷ they voted with the majority.

Judges Pinheiro Farinha and Pettiti argued along similar lines, but did not refer to the *James* case, and thus held that Article 6 (1) had been violated—access to the Arbitration Tribunal through the intermediary of the Stockholders' Representative could not be regarded as the same as direct access to the courts, and this had been prematurely terminated on the date of the Royal Assent.¹³⁸

Judges Russo and Spielmann agreed with the majority in general, but held that Article 6 (1) had been violated in the *Lithgow* case.¹³⁹ Even assuming that the purpose of limiting the right of access (prevention of a multiplicity of claims) was legitimate, this was not sufficient to justify the suppression of Sir William's fundamental right of access to a court, especially when he was the largest single shareholder in Kincaid. The argument that shareholders could always institute proceedings against their Representatives was also found to be unconvincing: such a remedy would be effective only if the shareholder could prove fraud or negligence, and a finding of responsibility on the part of the Representative would not be of much value to the shareholder in any event.

¹³³ Judgment of 21 February 1975, Series A, No. 18, para. 38.

¹³⁴ CR, paras. 473–8; Judgment, paras. 193–7.

¹³⁵ CR, para. 476.

¹³⁶ Judgment, p. 72.

¹³⁷ Judgment of 21 February 1986, Series A, No. 98, paras. 79–82.

¹³⁸ Judgment, pp. 73–6.

¹³⁹ Ibid., p. 77.

VIII. MISCELLANEOUS ISSUES

Article 13 of the Convention stipulates that:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Before the Commission, four of the applicants¹⁴⁰ alleged that no 'effective remedy' had been available to them in respect of their complaints concerning the adequacy of compensation, and therefore that the Government was in breach of Article 13. The Government submitted that the situation fell within the rule enunciated by the Commission in the *Young, James and Webster* case¹⁴¹ to the effect that Article 13 does not guarantee a remedy to control the conformity of domestic legislation with the Convention; in other words, Article 13 does not require the existence of a system of judicial review of legislation. The applicants contended that their cases fell outside this principle, since their complaint related to the exercise of the Minister's discretion under the Act, and not to the Act itself. The Government replied by saying that even if that were the case, an effective remedy was available through recourse to the Arbitration Tribunal. Only Sir William Lithgow pursued this point before the Court.

The Commission decided that it was not ready to depart from the views it had expressed in the *Young* case, and the Court agreed.¹⁴² To hold otherwise would be to require States to incorporate the substance of Article 13 into their domestic law with superior status to other laws, whereas the Court had held that neither Article 13 nor the Convention in general imposes such an obligation on States.¹⁴³ In any event, the Commission and Court felt that the remedies available to the applicants to enforce their rights under the Act were sufficient for the purposes of Article 13.

As regards the narrower question of the restriction of Sir William Lithgow's rights in favour of the Stockholders' Representative, the Court held that he had had the benefit of the collective system established under the Act; the Court had already held that this system did not violate Article 6 of the Convention, whose requirements are stricter than those of Article 13.¹⁴⁴ Thus Article 13 had not been violated in his case.¹⁴⁵

Judges Pinheiro Farinha, Pettiti and Spielmann dissented on the broad question; this was not surprising, given their view that there had been a violation of Article 6 (1) of the Convention.¹⁴⁶ Although Judge Russo held

¹⁴⁰ Lithgow, English Electric, Yarrow and Vickers.

¹⁴¹ Commission Report of 14 December 1979, para. 177.

¹⁴² CR, paras. 480-3; Judgment, paras. 204-8.

¹⁴³ *Silver* case, Judgment of 25 March 1983, Series A, No. 61, para. 113.

¹⁴⁴ *Sporrong* case, Series A, No. 52, para. 88.

¹⁴⁵ Judgment, para. 207.

¹⁴⁶ *Ibid.*, p. 73; cf. above, p. 71.

that Article 6 (1) had been violated in Sir William's case, he apparently did not reach the same conclusion with regard to Article 13.

Finally, before the Commission the applicants in the *BAC* and *Vickers* cases submitted that the Government had breached Article 18 of the Convention, which reads:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

They alleged that the Government had pursued an aim of unjust enrichment, and relied on similar arguments to those they had used to claim that the expropriation of their companies had not been in the 'public interest' (see above, section IV). The Government denied that the compensation formula was enacted with the aim of unjustly enriching itself and claimed there was nothing to show that the Act concealed any illegitimate purpose.

These applicants also submitted that the Government had intended to offset the burden of paying high compensation for declining companies against the benefit of paying reduced compensation for the growth companies which they (and others) owned. They alleged that this intention was contrary to Article 18, as well as Article 17, which stipulates that

Nothing in this Convention may be interpreted as implying for any State . . . any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein. . . .

The Commission, having already held that the compensation provisions were 'in the public interest' for the purposes of Article 1 of the Protocol, and also satisfied the requirements of Article 14, made short work of these arguments: the enactment of the 1977 Act had not been aimed at the destruction of the applicants' rights, nor had the applicants' rights been restricted for any improper purpose; the compensation formula had not been chosen, and was not operated, for the purpose of unjustly enriching the State. The Commission therefore concluded that there had been no breach of Articles 17 and 18.¹⁴⁷ These claims were not pursued before the Court.

IX. EPILOGUE

The case of *Lithgow and others* was the longest case in the history of the Court and Commission so far. It was no doubt also the most expensive, and the applicants must have wondered whether they had achieved anything at all after spending so much time and money. They must surely have been surprised at the vigorous defence put up by the Conservative

¹⁴⁷ CR, paras. 446-9.

Government, which had criticized the compensation terms so severely when in opposition. The Government was apparently unwilling to part with up to £600 million (including interest), which it might have been ordered to pay had the Court decided in the applicants' favour. The Conservative Government was perhaps in this difficulty: if it lost the case, it would face the prospect of a very large bill; without an adverse finding by a Convention organ, it did not have the 'cover' to settle; but if it succeeded before the Court, it would have saved a great deal of money but would have lost a weapon with which to resist future nationalization by its opponents. The irony of the situation was not lost on journalists, and Sir William Lithgow, when interviewed by the BBC, called the Government's win one of the 'greatest own goals in recent political history'.

The implications of the judgment are indeed far-reaching. The broad scope given to the Government's 'margin of appreciation' apparently leaves it open for governments to pay compensation at whatever level they feel is compatible with the social objectives of the nationalizing legislation, without much fear of condemnation from Strasbourg. This fact assumes great importance in the UK, given the possibility that the Labour Party, committed as it is to the renationalization of many of the industries sold off by the Conservative Government, could win a future General Election. As it was further observed, the Government may possibly have also scored an international 'own goal'. As the Court and Commission held that the reference to 'general principles of international law' in the Protocol did not apply to nationals, they did not have to decide the controversial question of what those principles currently require, and were careful not to pronounce on the issue. However, particularly in view of the apparent similarity between the Convention's and the customary law standard of 'fair compensation' (or the possibility, indeed, that the Convention standard may be *higher* than that of general international law), it would not be entirely surprising if some future expropriator of British-owned property were (rightly or wrongly) to invoke the Court's words about the wide margin of appreciation that Governments have in matters of valuation in order to justify a low level of compensation. Time will tell.

Perhaps we may also permit ourselves the speculation that, if perchance the Commission or the Court had felt that some at any rate of the applicants had been the victims of an injustice, they would have been in a dilemma as to how to proceed. On the one hand, to uphold all of the claims and give judgment for a massive sum could have provoked a re-evaluation by Governments—and not just the British Government—of their (optional) acceptance of the right of individual petition and of the jurisdiction of the Court, not to mention the Convention itself. On the other hand, there were obstacles in the way of upholding some only of the claims. The Government, it will be recalled, had virtually refused to join issue on the applicants' own vesting-day valuations. Given that the figures still had to be verified, it would have been a little difficult at this

stage to dismiss some of the applications on the grounds that the disproportion of compensation to value was too small, whilst allowing others to proceed to a further stage—perhaps an expert inquiry. Furthermore, given that (according to the applicants' calculations) the disproportion was in no case *de minimis*, to choose one particular threshold figure of disproportion rather than another might have been perceived as arbitrary.

Still in the realm of speculation, it is just conceivable that, whilst some commissioners and judges may have welcomed this new type of work, others may consciously or unconsciously have been troubled by the 'floodgates' argument and the prospect of an already over-long docket of 'mainstream' human rights cases being further extended by the property claims of the rich and by complex valuation disputes.

From this sort of perspective, the outcome could appear as a satisfactory compromise, or even a real advance. The 'victims' of nationalization will presumably not seek redress in Strasbourg (unless, perhaps, they are aliens). But at the same time, progress has been made through the extension of the *Sporrong* principle to the whole of Article 1 of the Protocol and the determination that compensation is normally required when property rights are interfered with. This offers some hope to, for instance, the owners of established pension rights and to those whose houses or business premises are expropriated for planning purposes. For those who may regard such rights as qualitatively different from the ownership of the 'commanding heights of the economy', this is a sufficient advance. On any view, it is potentially a significant development, the implications of which will now have to be worked out in practice.

Of course, none of this is of any comfort to the unsuccessful applicants, at least some of whom, on any reckoning, received only a fraction of what their property was really worth when it was taken. As so often in these matters, we have to read between the lines, between the recriminations and the self-justifications, for what went wrong. When the legislation was first introduced, the reference period was perhaps not so remote that grave injustice would have been done if the Bill had promptly become law. At this point, in other words, the valuation criteria were, arguably, reasonable, or at any rate not so unreasonable as to exceed the legislature's wide margin of appreciation. Unexpectedly, however, the legislative process took far longer than expected, and other developments, such as high inflation, made 1973-4 valuations increasingly unrealistic. As the delays increased, the Government reconsidered the compensation terms, but decided not to change them. Perhaps it was worried about further delaying its programme; perhaps it thought that to change the terms would be unfair to those who had already made dispositions on the basis of what was announced; perhaps, too, it was not displeased with the windfall which inflation might bring. Beyond a certain point, we can only speculate. Be that as it may, it refused to change the terms, and the applicants—though not some other companies—were the losers. Five judges thought that the

Government should have revised the terms when it saw how matters were developing; thirteen thought that this was unnecessary. On this, opinions will no doubt continue to differ.

It does not appear from the record that the Government set out with any intent to despoil the applicants or to deprive them of their fundamental rights. At worst, it was guilty of inflexibility and, perhaps, a degree of opportunism. It is of such banalities, rather than wickedness and oppression, that Strasbourg litigation is typically made. We should not excuse such failings when we encounter them, though we should be glad that, in Western Europe at least, things are not worse. In many parts of the world, alas, things are indeed a lot worse, and the phrase 'human rights' has a much more urgent connotation.¹⁴⁸

¹⁴⁸ Assistance by Mr Steven Hankey, undergraduate of St John's College, Oxford, in the preparation of this article is gratefully acknowledged. Responsibility for any errors, and for the views expressed, remains the author's.

COMPLICITY IN INTERNATIONAL LAW: A NEW DIRECTION IN THE LAW OF STATE RESPONSIBILITY*

By JOHN QUIGLEY¹

I. INTRODUCTION

As international law matures, it regulates inter-State relations in an ever more sophisticated fashion. One area of increasing sophistication is complicity in the law of State responsibility. While it has long been recognized that a State is responsible for infringing internationally protected rights, only since the Second World War has a norm emerged to hold a State responsible for aiding another State to violate such rights. Appearing first in situations where one State permits another to use its territory to violate rights of a third State, the norm has gained acceptance across the full range of acts entailing State responsibility. The norm represents an international corollary to domestic norms that hold responsible in tort or criminal law one who aids another in committing a wrongful act. This article will examine the status of the complicity norm in international law. It will argue that such a norm has been accepted as customary law. Further, it will examine complicity in the specific situation of a State giving aid to another in an ongoing programme of foreign assistance. It will argue that a donor State is liable for complicity in internationally wrongful acts committed by the donee State utilizing contributed resources, where the donor State intends the contributed resources to be so used, or where it is aware that they will be so used.

The article will also examine a number of issues relevant to establishing a donor State's liability. Must the donee State use the specific funds contributed to carry out the international delict before the donor is liable, or is it sufficient if the donated resources free others that the donee State then uses to carry out the wrongful acts? Does it matter whether the illegal act serves the policy interests of the donor State? Must it appear that the donee State could not have obtained the aid from another source, thereby making the donor State's aid the only resource available to fund the illicit conduct? Must it appear that the donor State could not have carried out the illicit conduct but for the donated resources? Does it matter whether the donor State has objected to the illicit conduct being carried out by the donee State? Finally, the article will examine remedies available against a State liable for its complicity.

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¹ AB, MA, LL B (Harvard); Professor, College of Law, Ohio State University. The author wishes to thank Professor Jules Lobel for his comments on a draft of this article.

II. COMPLICITY DEFINED

Complicity liability arises where a State facilitates the commission by another State of an internationally wrongful act.² An internationally wrongful act is one that violates an international obligation of a State.³ The act may infringe the rights of another State (aggression, violation of property interests of aliens, violation of use of the high seas), the rights of a State's own citizens (slavery, genocide, *apartheid*⁴ or other violations of human rights),⁵ or the rights of a people (violation of self-determination).⁶ The International Law Commission has stated that a State is liable as an accessory

whether the principal wrongful act is committed against a State or a particular group of States, a subject of international law other than a State, or the international community as a whole.⁷

² Report of the International Law Commission to the General Assembly, *General Assembly Official Records* (hereinafter *GAOR*), 33rd Session, Supplement 10, at p. 243, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 99, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2); N. A. Ushakov, *Osnovaniia mezhdunarodnoi otvetstvennosti gosudarstv* (*Foundations of the International Responsibility of States*) (1983), p. 51.

³ Draft articles on State responsibility, Article 3 (b), in Report of the ILC to the General Assembly, *GAOR*, 35th Session, Supplement 10, at p. 59, UN Doc. A/35/10 (1980), reprinted in *Yearbook of the ILC*, 1980, vol. 2, p. 30, UN Doc. A/CN.4/SER.A/1980/Add. 1 (pt. 2). The act must actually be committed: Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at pp. 255-6, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 104, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2). For a discussion of the various terms (tort, delict, illegal act, etc.) used in English and other European languages to denote internationally wrongful conduct and of the ILC decision to use 'internationally wrongful act' in English, see P. M. Kuris, 'K voprosu ob opredelenii poniatiia mezhdunarodnogo pravonarusheniia' ('Towards the Question of Defining the Concept of an International Law-Violation'), *Soviet Year Book of International Law*, 1972, pp. 78-88; V. A. Mazov, *Otvetstvennost' v mezhdunarodnom prave* (*Responsibility in International Law*) (1979), pp. 15-16. For analysis of the term 'responsibility', see P. Vršansky, 'Pojem zodpovednost' v medzinárodnóm práve', *Pravni Obzor*, 10 (1980), pp. 905-14.

⁴ *Filartiga v. Peña-Irala*, 630 F.2d 876, 884-5 (2d Cir. 1980); Report of the ILC to the General Assembly, *GAOR*, 28th Session, Supplement 10, at p. 22, UN Doc. A/9010/Rev. 1 (1974), reprinted in *Yearbook of the ILC*, 1973, vol. 2, p. 183, UN Doc. A/CN.4/SER.A/1973/Add. 1. Draft Article 19, para. 3 (c), includes slavery, genocide and *apartheid* as acts violating an international obligation of a State: draft articles on State responsibility, in Report of the ILC to the General Assembly, *GAOR*, 35th Session, Supplement 10, at p. 64, UN Doc. A/35/10 (1980), reprinted in *Yearbook of the ILC*, 1980, vol. 2, p. 32, UN Doc. A/CN.4/SER.A/1980/Add. 2 (pt. 2). See also Ushakov, op. cit. above (n. 2), at p. 149.

⁵ In the *Barcelona Traction* case, the International Court of Justice stated *obiter* that obligations violation of which entails State responsibility 'derive . . . from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination': *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, ICJ Reports, 1970, p. 32, para. 34 (judgment of 5 February). For the conclusion that racial discrimination violates State responsibility, see D. B. Levin, *Otvetstvennost' gosudarstv v sovremennom mezhdunarodnom prave* (*State Responsibility in Contemporary International Law*) (1966), p. 101.

⁶ G. I. Tunkin, *Theory of International Law* (translated by W. E. Butler, 1974), p. 419; advisory opinion on *Namibia*, ICJ Reports, 1971, pp. 16, 56 (para. 27: 'the injured entity is a people').

⁷ Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at p. 257, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 105, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2).

The ILC has included a provision on complicity in its draft articles on the law of State responsibility.⁸ In the ILC's 1977 draft the provision read:

Article 25. *Complicity of a State in the Internationally Wrongful Act of Another State.*

The fact that a State renders assistance to another State to commit an international offence against a third State constitutes an internationally wrongful act of the State, which thus becomes an accessory to the commission of the offence and incurs international responsibility thereby, even if the conduct in question would not otherwise be internationally wrongful.⁹

In the ILC's 1978 (most recent) draft, the terms 'complicity' and 'accessory' are omitted,¹⁰ and the provision, which became Article 27, reads:

Article 27. *Aid or Assistance by a State to Another State for the Commission of an Internationally Wrongful Act.*

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.¹¹

⁸ For Draft Articles 1-27, see Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at pp. 187-96, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, pp. 78-80, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2). Though it commenced its work on State responsibility in 1953, the ILC initially focused almost exclusively on the issue of State responsibility for harm to the person or property of aliens. See, e.g., F. V. García Amador (ILC Special Rapporteur on State responsibility at that period), *Principios de derecho internacional que rigen la responsabilidad* (1963), and his reports to the ILC during those years (cited *ibid.* at p. 7); G. I. Tunkin (Soviet member of ILC), 'Problema mezhdunarodno-pravovoi otvetstvennosti gosudarstva v komissii mezhdunarodnogo prava OON' ('The Problem of International-Legal Responsibility of a State in the International Law Commission of the UN'), *Soviet Year Book of International Law*, 1960, pp. 92-101. Beginning in 1963, the ILC changed direction, focusing on all situations in which one State is responsible for breach of an international obligation. This new orientation led the ILC to deal with situations like armed aggression, where aid by one State to another in perpetrating the wrong is possible. For a description of the change in the ILC's orientation, see V. A. Mazov, *Otvetstvennost' v mezhdunarodnom prave (Responsibility in International Law)* (1979), pp. 20-38; Iu. M. Kolosov, *Otvetstvennost' v mezhdunarodnom prave (Responsibility in International Law)* (1975), pp. 90-101.

⁹ Ago, 'Seventh Report on State Responsibility', *Yearbook of the ILC*, 1978, vol. 2, pt. 1, p. 60, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 1).

¹⁰ The terms 'complicity' and 'accessory' were apparently dropped because the article does not prohibit certain acts commonly included as complicity in domestic law, namely, moral aid and incitement, on which see text accompanying note 15, below. Referring to the cases covered by Draft Article 27, the ILC stated: 'Cases such as this can be defined as instances of "complicity", but obviously in the particular sense this term may possess in international law, where it is far from having the same meaning as is attributed to it in the different internal legal orders of States': Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at p. 250, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 102, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2). In the Sixth Committee the Nigerian delegation 'endorsed the Commission's decision to discard the concepts of "complicity" and "accessory"' as concepts pertaining to the field of municipal law: *GAOR*, 33rd Session, Sixth Committee, 42nd meeting, at p. 12, para. 41, UN Doc. A/C.6/33/SR.42 (1978).

¹¹ Report of the ILC, *loc. cit.* above (n. 8), at pp. 187-96. Draft Articles 1-35 are reprinted in I. Brownlie, *System of the Law of Nations—State Responsibility Part I* (1983), at pp. 284-94.

The ILC apparently intends liability to be found only where the 'principal' State actually carries out the wrongful act. Brazilian ILC member (as he then was) José Sette Camara found such a requirement in the phrase 'carried out by the latter'.¹²

Complicity should be distinguished from vicarious (indirect) liability, where one State is responsible for the international delicts of another on the basis that the former is legally responsible for the acts of the latter, as, for example, where the latter is a protectorate of the former.¹³ Complicity should also be distinguished from joint liability, where two States participate together as principals in committing an internationally wrongful act. However, joint liability in certain situations is difficult to differentiate from complicity liability. This issue will be considered further below.¹⁴

Complicity does not include moral encouragement or incitement by a State to another State to engage in an internationally wrongful act, although both acts would constitute complicity in domestic law.¹⁵ Neither moral encouragement nor incitement renders a State liable for the wrongful act of the State encouraged or incited.¹⁶ The ILC notes that

¹² *GAOR*, 33rd Session, Sixth Committee, 27th meeting, at pp. 20-1, para. 66, UN Doc. A/C.6/33/SR.27 (1978).

¹³ C. Eagleton, *The Responsibility of States in International Law* (1928), pp. 35-40; G. Cohn, 'La Théorie de la responsabilité internationale', *Recueil des cours*, 68 (1939-II), pp. 207, 291; *Rights of Nationals of the United States in Morocco (France v. US)*, *ICJ Reports*, 1952, p. 185 (France responsible for acts of Morocco); *Mavrommatis Palestine Concessions*, *PCIJ*, Series A, No. 2 (1924), at p. 23 (Britain responsible for administration of Palestine, over which it exercised a mandate). See generally Friedrich Klein, *Die Mittelbare Haftung im Völkerrecht: Die Haftung eines Völkerrechtssubjektes für das völkerrechtswidrige Verhalten eines anderen Völkerrechtssubjektes* (1941). This subject is covered by Article 28 of the ILC draft. For the text and discussion of Draft Article 28, see Report of the ILC to the General Assembly, *GAOR*, 34th Session, Supplement 10, at pp. 248-83, UN Doc. A/34/10 (1979); and Ago, 'Eighth report on State Responsibility', *Yearbook of the ILC*, 1979, vol. 2, pp. 4-27, UN Doc. A/CN.4/SER.A/1979/Add. 1 (pt. 1).

¹⁴ On this distinction see pp. 105-6 nn. 167-70, below.

¹⁵ Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at pp. 244-6, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, pp. 100-1, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2). Incitement may, however, be prohibited by treaty. See, e.g., a duty to prevent encouragement of *apartheid* in Article 4 (a) of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, *GAOR*, 28th Session, Supplement 30, p. 75, reprinted in *International Legal Materials*, 13 (1974), p. 50. See also the General Assembly Resolution on war propaganda, which condemns 'propaganda . . . designed . . . to provoke aggressions', in effect a prohibition against incitement to aggression: GA Res. 110 (II), 8 November 1947; the Convention on the Prevention and Punishment of Genocide, opened for signature 9 December 1948, Article III (c), *United Nations Treaty Series*, vol. 78, p. 277. In *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice construed common Article 1 of the four 1949 Geneva humanitarian conventions (requiring States parties to 'ensure respect' for these conventions) to impose an obligation 'not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions': *ICJ Reports*, 1986, p. 104. It found the US liable to Nicaragua on this basis: *ibid.*, p. 139. But it stated that this obligation prohibits incitement of 'persons or groups' only, not of a State, and suggested that incitement is not an act that entails State responsibility: 'The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement': *ibid.* at p. 120.

¹⁶ Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at pp. 244-6, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, pp. 100-1, UN Doc.

protests have been filed charging incitement but reports no such claim at the juridical level.¹⁷ Complicity does not include coercion by one State of another to commit an internationally wrongful act. Here both the coercing State and perhaps also the coerced State (at least if it did not object to the coercion) are liable as principals.¹⁸ Further, a State is not responsible for the acts of another State committed within or from the territory of the former, in the absence of fault on the part of the host State.¹⁹

Finally, the analysis will reveal situations in which a State assumes by treaty an obligation to refrain from complicity in specified potentially wrongful acts of other States. Here the obligation to avoid complicity arises not from a customary norm but from assumption of the treaty obligation.

III. STATUS OF COMPLICITY AS A CUSTOMARY NORM

There is as yet no treaty on the law of State responsibility. If complicity is prohibited, it must be by a customary norm. Customary norms are developed by State practice.²⁰ The ILC has concluded that State practice

A/CN.4/SER.A/1978/Add. 1 (pt. 2). The only authors who assert that conspiracy and incitement are acts entailing international legal responsibility of a State are Graefrath, Oeser and Steiniger. They write: 'If a state, either through another or together with it, causes, whether directly or indirectly, the violation of an international-legal obligation, the former in this way brings on its own sovereign fault and international-legal responsibility. In this sense is Ago in agreement when he states that "any form of conspiracy, or complicity, or of incitement" to a violation of an international-legal obligation is incompatible with international law' (citing Ago, 'Le Délit international', *Recueil des cours*, 68 (1939-II), pp. 416, 523). The authors give no State practice or other evidence to back their assertion that conspiracy and incitement entail State responsibility. Moreover, their reference to Ago is inaccurate, since in the quoted 1939 article Ago states that conspiracy, complicity and incitement do *not* entail international legal responsibility. The full sentence from which the quoted language of Ago is taken reads: 'What appears *inconceivable* in international law is any form of conspiracy, or complicity, or of incitement in a wrong' (emphasis supplied). The authors have quoted Ago out of context and make it appear he reaches the opposite conclusion: B. Graefrath, E. Oeser, P. A. Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten* (1977), p. 64.

¹⁷ Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at p. 245, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 100, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2). See also the comment of the Japanese ILC member applauding the Commission for omitting 'incitement' in its draft of Article 27: *GAOR*, 33rd Session, Sixth Committee, 37th meeting, at p. 13, para. 47, UN Doc. A/C.6/33/SR.37 (1978). A charge of encouraging aggression was made by the USSR when it charged the US and certain other powers in June 1967 with being 'accomplices in aggression' by refusing to call for an immediate Israeli withdrawal from Arab territories it had recently taken. A. Kosygin, Chairman of the Council of Ministers of the USSR, asserted that by taking that position the US had helped Israel gain time to acquire more territory: *United Nations Yearbook*, 1967, p. 192. Ushakov argues that incitement to aggression is internationally wrongful apart from complicity: *op. cit.* above (p. 78 n. 2), at pp. 146-7.

¹⁸ Ushakov, *op. cit.* above (p. 78 n. 2), at p. 147; Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at pp. 248-9, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, pp. 101-2, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2).

¹⁹ Summary Records of the 1312th meeting, *Yearbook of the ILC*, 1975, vol. 1, p. 42, Article 12, paras. 1, 4, UN Doc. A/CN.4/SER.A/1975. Para. 1 provides: 'The conduct of an organ of another State or of an international organization acting in that capacity in the territory of a State, shall not be considered as an act of that State under international law.'

²⁰ See, generally, A. D'Amato, *The Concept of Custom in International Law* (1971); K. Wolfke, *Custom in Present International Law* (1964).

on complicity is sufficient to warrant a conclusion that complicity is accepted by States as customary law.²¹ That practice is of recent origin.

In a 1939 work, Judge Ago, who in the 1970s served as Special Rapporteur for the ILC when it was drafting its complicity article, stated that no concept of complicity had developed by that time in the law of State responsibility:

What appears inconceivable in international law is any form of complicity, or of incitement in a wrong. The law of nations in its present structure does not include these forms of joint consideration of several subjects vis-à-vis a single wrong that are characteristic of municipal penal law.²²

Until the ILC drafted a complicity provision in the 1970s, writers on State responsibility did not mention it.²³ But the post-War world produced enough State practice to enable the ILC to conclude in 1978 that such liability had been accepted as customary law.²⁴ As examples of complicity Special Rapporteur Ago cited:

- (a) providing means for the closure of an international waterway;
- (b) facilitating the abduction of persons on foreign soil;
- (c) assisting in the destruction of property belonging to nationals of a third country.²⁵

Ago also cited the situation in which a State allows another to use its territory to commit aggression against a third State. This act, he noted, was defined as aggression by the United Nations General Assembly in its

²¹ R. Ago, 'Seventh report on State Responsibility', *Yearbook of the ILC*, 1978, vol. 2, pt. 1, p. 31 at p. 59, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 1).

²² Ago, loc. cit. above (p. 81 n. 16), at p. 523. Ago refers to this 1939 statement in a 1978 report for the ILC: 'In 1939, the Special Rapporteur, describing the situation at that time, was still able to exclude, in principle, from the scope of the rules then in force the idea of complicity in an internationally wrongful act': Ago, loc. cit. (previous note), at p. 59. Ago's 1939 statement is misquoted by Graefrath, Oeser and Steiniger, who state that complicity entails State responsibility and cite Ago's 1939 statement as supporting that view: see above, p. 81 n. 16. For a bibliography of works on State responsibility from the mid-nineteenth century to 1930, see I. Brownlie, 'The History of State Responsibility', in Gutierrez, Ridder, Sarin, Schiller (eds.), *New Directions in International Law: Essays in Honour of Wolfgang Abendroth: Festschrift zu seinem 75. Geburtstag* (1982), pp. 19-26.

²³ See, e.g., Eagleton, op. cit. above (p. 80 n. 13); A. Bustamante, *Derecho internacional público*, vol. 3 (1936); C. Rousseau, *Droit international public* (1953); D. Anzilotti, 'Teoria generale della responsabilità dello Stato nel diritto internazionale' (1902), reprinted in *Scritti di diritto internazionale pubblico*, vol. 1 (1956), pp. 1-147; H. Accioly, 'Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence', *Recueil des cours*, 96 (1959-I), pp. 350-441; Levin, op. cit. above (p. 78 n. 5). The only authors to assert the existence of a complicity norm prior to appearance of the ILC draft are Graefrath, Oeser and Steiniger, op. cit. above (p. 81 n. 16), at p. 64. The term 'complicity' has been used to refer to a State's responsibility for failure to protect aliens against the wrong acts of individuals: see, e.g., J. L. Brierly, 'The Theory of Implied State Complicity in International Claims', this *Year Book*, 9 (1928), pp. 42-9.

²⁴ Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at pp. 252-3, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 103, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2).

²⁵ Ago, loc. cit. above (n. 21), at p. 58.

1974 Definition of Aggression.²⁶ Article 3(f) of the Definition includes as aggression:

The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.²⁷

(a) *Situations in which Complicity is found in State Practice*

1. *Permitting territory to be used for a wrongful act*

One prominent area of State practice has been situations in which a State has permitted its territory to be used by another State to carry out wrongful acts. In his commentary to Article 27, Ago cited a 1958 protest by the USSR charging the Federal Republic of Germany with complicity in aggression by the United States against Lebanon. The United States had flown US troops to Lebanon from a Frankfurt airport and an air-base at Furstenfeldbruck in Bavaria.²⁸ The FRG replied that the US action in Lebanon was lawful, so that its grant of permission to use the air-bases was lawful.²⁹ Ago concluded that the FRG reply was based on the premiss that, had the US action been unlawful, the FRG's assistance would have constituted unlawful complicity.³⁰

The USSR protest to the FRG charged it with allowing another State to use its territory to perpetrate aggression. This situation formed the basis for a series of other protests in the 1950s and 1960s. The USSR protested

²⁶ Ibid., GA Res. 3314, *GAOR*, 29th Session, Supplement 31, at p. 142, UN Doc. A/9631 (1975), reprinted in *International Legal Materials*, 12 (1974), p. 710.

²⁷ GA Res. 3314, loc. cit. (previous note). Acts constituting complicity may also involve a direct violation of international law. The Organization of American States characterized as illegal the provision of material assistance by the US to the UK during the Malvinas-Falklands conflict in 1982. Charging the UK with 'acts of war against the Argentine Republic', the OAS resolved 'to urge the Government of the United States of America . . . to refrain from providing material assistance to the United Kingdom, in observance of the principle of hemispheric solidarity recognized in the Inter-American Treaty of Reciprocal Assistance': Twentieth Meeting of Consultation of Ministers of Foreign Affairs, Res. I, 'Serious Situation in the South Atlantic', OEA/Ser.F/II. 20, doc. 80/82, rev. 2, at p. 3 (29 May 1982), reprinted in *International Legal Materials*, 21 (1982), p. 672, at p. 674. The charge against the US was thus framed not as complicity but as a violation of a direct obligation of the US under Article 3 (2) of the Inter-American Treaty of Reciprocal Assistance (Rio Pact), 2 September 1947, *Statutes at Large*, vol. 62, p. 1681, *Treaties and Other International Acts Series*, No. 838, *United Nations Treaty Series*, vol. 121, p. 77, which calls upon member States to take measures to protect an American State subjected to armed attack.

²⁸ Note of 24 July 1958, *Keesing's Contemporary Archives*, p. 16333 (1958).

²⁹ In a note to the USSR on 15 August 1958, the FRG, replying to the USSR charge of complicity in aggression, stated: 'There can be no doubt that the allies of the German Federal Republic were not guilty of any aggression in the Near and Middle East, and that thus the contention contained in the note of the Government of the Union of Soviet Socialist Republics that the German Federal Republic has supported aggression has no basis. . . . The Government of the German Federal Republic has never approved or favored an act of aggression. Neither has it ever placed the territory of the Federal Republic at the disposal of another for such an act': H. Alexy, 'Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1958', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 20 (1959-60), pp. 636, 663-4. Another protest note of the USSR on the same topic of 6 September 1958, was rejected by the FRG in a note of 16 October 1958: *ibid.* at p. 664.

³⁰ Ago, loc. cit. above (p. 82 n. 21), at p. 59.

to Italy over having permitted US troop carrier planes to take off from Capodichino airport for the 1958 Lebanon intervention, and over having permitted US troops to leave by sea for Lebanon from Naples, Genoa and Taranto. It also protested to Israel at the same time about permitting US and British planes to overfly Israel en route to Jordan, in connection with British military intervention in that country. The USSR characterized that intervention as illegal. It accused Israel of having 'become a direct accomplice in the aggressive actions of the United States and Britain'.³¹

In 1965 the British Government protested to Egypt and to Yemen over an alleged attack by Egyptian aircraft on a village and guard post in Beihan in South Arabia. According to the British statement, the aircraft, after completing the attack, flew into Yemen. Britain protested to Yemen, on the theory that Yemen had permitted the Egyptian aircraft to operate out of Yemen.³² Yemen apparently did not reply formally to the British charge.

In 1963 the UK defended itself against a complicity charge involving alleged use of its territory for military operations against another State. The UK had been criticized over alleged smuggling of explosives and napalm from Formosa to southern China through its colony of Hong Kong. The material was allegedly being used for sabotage in southern China. Responding, the British Prime Minister stated:

I am sure that all friendly Governments share our concern that Hong Kong should not be used as a base for sabotage against foreign territory.³³

In 1986 Libya charged the UK with responsibility for aiding the US to commit what Libya characterized as aggression against Libya. The UK had permitted US bomber aircraft to take off from bases in the UK to make a bombing raid into Libya. Libya asserted that the UK 'would be held partly responsible' for having 'supported and contributed in a direct way' to the raid.³⁴ The UK response was that the US raid was lawful as an act of self-defence against alleged Libyan terrorist attacks on US targets.³⁵

Protests alleging that a State permitted its territory to be used as a base from which to commit a wrongful act have not all involved situations of armed aggression. Several have concerned infringements of air space. Ago cited a 1956 protest by the USSR to the FRG against the alleged launching by US military forces stationed in the FRG of observation

³¹ Notes of 1 August 1958, *Keesing's Contemporary Archives*, pp. 16333-4 (1958).

³² Hansard, *House of Commons Debates*, 5th series, vol. 715, cols. 620-1 (1965), reprinted in E. Lauterpacht (ed.), *British Practice in International Law 1965*, p. 84.

³³ Hansard, *House of Commons Debates*, 5th series, vol. 671, col. 1485 (1963), reprinted in E. Lauterpacht (ed.), *British Practice in International Law 1963*, p. 25.

³⁴ *The Times*, 16 April 1986, at p. 6, col. 7 (statement of Ambassador Hamed Houdeiry, Libyan People's Bureau, Paris).

³⁵ Statement of Mrs Margaret Thatcher, Prime Minister: 'I believe that the United States was absolutely within its rights to exercise its right of self-defence': Hansard, *House of Commons Debates*, 6th series, vol. 95, col. 737 (15 April 1986) (weekly issue no. 1379).

balloons equipped with automatic cameras and radio transmitters. Two such balloons were subsequently intercepted in Soviet air space.³⁶ The USSR also alleged that other balloons launched contained propaganda leaflets.³⁷

The USSR also protested to Turkey concerning the alleged launching of US spy balloons from Turkish territory.³⁸ The USSR accused both Germany and Turkey of permitting their territory to be used to violate its air space.³⁹ In its response, Turkey said that US balloons launched from its territory were meteorological, and that they flew at high altitudes.⁴⁰ The Turkish assertion about altitude was apparently made to suggest that the overflights did not violate air space, and that Turkey therefore was not aiding an unlawful act. Thus, as with Germany's response to the USSR mentioned above, Turkey's response was based on the premiss that had the US act been unlawful, Turkey would have been complicit.

One protest charged that a State allowed its territory to be used by another State to make statements allegedly slandering a third State. Ago cited a 1960 protest by the FRG against Austria after Soviet Premier Nikita Khrushchev, speaking at a press conference during a visit to Austria, compared German Chancellor Konrad Adenauer to Adolf Hitler. The German protest blamed the Austrian Government for failing to protest at Premier Khrushchev's statement.⁴¹ The US also protested to Austria over what it termed 'slanderous attacks' by Khrushchev against the US during this same visit to Austria. The US protested at Austria's failure to dissociate itself from Premier Khrushchev's remarks.⁴² Austria rejected the German and US protests, asserting that it 'had no power to influence the content of the speeches which Mr Khrushchev made on Austrian territory', but that it was 'naturally not in agreement with the point of view expressed'.⁴³ Thus Austria implicitly recognized the complicity norm by arguing that its action in the matter did not constitute complicity.

As the above examples illustrate, the first sphere in which States began to make charges of complicity liability involved situations in which a State permitted use of its territory for the commencement by another State of an internationally wrongful act. While the act of the principal State typically involved armed aggression, that was not always the case, as is shown by the examples involving violation of air space.

On occasion a charge of allowing a State's territory to be used as a base

³⁶ Summary Records of the 1312th meeting, loc. cit. above (p. 81 n. 19), at p. 42.

³⁷ Note to Germany of 13 September 1955, *Keesing's Contemporary Archives*, p. 14426 (1955); and Note to Germany c.4 February 1956, *ibid.* at p. 14723 (1956).

³⁸ Note of 20 February 1956, *ibid.*, p. 14723 (1956).

³⁹ Summary Records of the 1312th meeting, loc. cit. above (p. 81 n. 19), at p. 42.

⁴⁰ Note of 12 February 1956, *Keesing's Contemporary Archives*, p. 14624 (1956); *Le Monde*, 14 February 1956, at p. 5, col. 3.

⁴¹ Summary Records of the 1312th meeting, loc. cit. above (p. 81 n. 19), at p. 42.

⁴² *New York Times*, 8 July 1960, at p. 3, col. 2.

⁴³ Austrian Cabinet communiqué, 12 July 1960, *Keesing's Contemporary Archives*, p. 17599 (1960).

for commission of an internationally wrongful act has been couched in the terminology of complicity, as in the USSR's charge that Israel was an 'accomplice' in aggression by the US and the UK.⁴⁴ But typically the language of complicity has not been used. This is true as well of the General Assembly's Definition of Aggression, which characterizes simply as aggression the act of allowing territory to be used by another State for aggression.⁴⁵ By including this act along with others constituting aggression, the Definition appears to consider such an act as an independent act of aggression. It is submitted, however, that what the General Assembly actually had in mind is complicity.

It is conceptually more precise to consider this liability as being derivative rather than independent. The wrong by the State permitting its territory to be used for aggression comes about only because the other State carries out aggression. There is no liability apart from the act of the other State. If, hypothetically, a State agrees to permit another State to launch an aggressive air-raid from its territory with that aim, but while the aircraft are *en route* that State decides to abort the air-raid, there is no liability on the part of the State whose territory was used. Its liability exists only if the 'principal' State is liable. Thus, while the General Assembly Definition of Aggression appears to render simply as an independent form of committing aggression the act of permitting one's territory to be used by another State to launch aggression, in fact the liability is based on complicity.

2. *Political acts that promote a wrongful act*

State practice indicates that a State may commit a wrongful act by executing a political act that promotes the wrongful act of another State. The USSR charged the US with being an 'accomplice' in Israel's 'brazen aggression in Lebanon' in 1982 after the US vetoed a Soviet-drafted Security Council resolution that called for termination of supply of arms and other military aid to Israel until it withdrew its forces from Lebanon.⁴⁶ The resolution received eleven affirmative votes, while three States abstained.⁴⁷

The International Court of Justice required States to abstain from certain political acts in ruling that States are obliged to refrain from carrying out dealings with South Africa that impliedly recognize the legality of South Africa's occupation of Namibia.⁴⁸ The Court's theory was that such dealings would assist South Africa in perpetrating an internationally wrongful act, namely its assertedly unlawful occupation. The Court based that conclusion both on Article 25 of the UN Charter,

⁴⁴ See p. 84 n. 31 above.

⁴⁵ See p. 83 n. 27 above.

⁴⁶ *New York Times*, 7 August 1982, at p. 4, col. 5.

⁴⁷ *Ibid.*, col. 1.

⁴⁸ Advisory opinion on *Namibia*, *ICJ Reports*, 1971, p. 16, at p. 58.

which requires member States to carry out decisions of the Security Council (the Council had called for such abstention), and on 'general international law'. While the Court did not explain the basis for its conclusion that general international law requires States to refrain from the indicated dealings with South Africa, its position was that South Africa was committing an act that violated State responsibility and that other States were prohibited from assisting that violation.⁴⁹

The UN Security Council also asked States to refrain from such dealings. The Council

call[ed] upon all states . . . (d) to abstain from sending diplomatic or special missions to South Africa that include the Territory of Namibia in their jurisdiction; . . . (f) to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.⁵⁰

3. *Provision of material aid*

(i) *Aid used for aggression.* In recent years State practice on complicity has been most substantial in provision of material aid. Aid has been asserted to be unlawful where it has been used for committing aggression, for violating rules of warfare, and for violating human rights. Brownlie writes that 'the objectives of aid must be lawful', that provision of material aid is unlawful if 'intended to further preparation for unlawful resort to force',⁵¹ and that supply that may entail responsibility includes 'weapons, military aircraft, radar equipment' used for aggression.⁵² Ago cited as complicity in aggression the supplying of another State with weapons to attack a third State.⁵³ The Thai ILC member said that Article 27 would apply to sale of arms or military equipment for use by the recipient State to commit an internationally wrongful act.⁵⁴

Mr Lauterpacht, commenting on a 1958 incident, stated that an arms supplier could be responsible for complicity.⁵⁵ The British Government had been asked whether it would protest to alleged suppliers of arms to Yemen, when Yemen was allegedly using those arms for aggressive purposes. The Government replied that

⁴⁹ Ibid., at p. 55.

⁵⁰ SC Res. 301, *Security Council Official Records* (hereinafter *SCOR*), 27th Session, 1598th meeting, at p. 7 (1971). Similar calls were contained in earlier Security Council resolutions: see SC Res. 283, *SCOR*, 25th Session, 1550th meeting, at p. 1 (1970); SC Res. 276, *SCOR*, 25th Session, 1529th meeting, at p. 1 (1970). SC Res. 301 also endorsed the advisory opinion on *Namibia* of the International Court of Justice, loc. cit. above (p. 86 n. 48).

⁵¹ I. Brownlie, *Principles of Public International Law* (3rd edn., 1979), pp. 259–60.

⁵² Brownlie, op. cit. above (p. 79 n. 11), at p. 191.

⁵³ Ago, loc. cit. above (p. 82 n. 21), at p. 58.

⁵⁴ *GAOR*, 33rd Session, Sixth Committee, 38th meeting, at p. 5, para. 14 (statement of Sompong Sucharitkul), UN Doc. A/C.6/33/SR.38 (1978).

⁵⁵ Hansard, *House of Commons Debates*, 5th series, vol. 589, col. 891 (1958), reprinted in E. Lauterpacht, 'The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment, VI, January 1–June 30, 1958', *International and Comparative Law Quarterly*, 7 (1958), pp. 514, 551.

the policy of Her Majesty's Government has always been to urge restraint in arms deliveries to the Middle East but arms deliveries do not in themselves constitute grounds for protest.⁵⁵

Commenting on the Government statement, Lauterpacht wrote:

There is . . . nothing in the Answer to support the view that a State which knowingly supplies arms to another for the purpose of assisting the latter to act in a manner inconsistent with its international obligations can thereby escape responsibility for complicity in such illegal conduct.⁵⁶

The concept that States must refrain from facilitating aggressive acts by other States appears in the UN Charter. Article 2, paragraph 5, requires member States to 'refrain from giving assistance to any state against which the UN is taking preventive or enforcement action'.⁵⁷ The rationale here is that the target State is acting unlawfully. The Charter requires States to avoid assisting that illegality.

The US has invoked complicity in aggression in charging the Soviet Union with supplying other States financially and militarily. One US official charged:

Soviet arms are the life's blood of Soviet aggression by proxy. In recent years, the Soviets and their proxies have repeatedly used force or the threat of force to expand their influence and frustrate peaceful change. With Soviet arms and support, Vietnamese troops occupy Kampuchea and threaten Thailand; Libya threatens Chad, Tunisia, the Sudan, Egypt, and Morocco; Afghani planes and armored units raid Pakistan; and Cuban troops stationed in Angola and Ethiopia threaten regional stability.⁵⁸

US Ambassador to the UN Jeane Kirkpatrick, speaking to the UN General Assembly, charged Vietnam with violating 'fundamental provisions of the UN Charter—the inviolability of the sovereignty, independence, and territorial integrity of nations' in its military occupation of Kampuchea.⁵⁹ 'The Government of Vietnam', she continued, 'financed and supported by the Soviet Union, has conquered a member state of this Organization'.⁶⁰

US President Ronald Reagan has charged the USSR with complicity in what he alleged to be aggressive acts of Cuba:

⁵⁵ Hansard, *House of Commons Debates*, 5th series, vol. 589, col. 891 (1958), reprinted in E. Lauterpacht, 'The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment, VI, January 1–June 30, 1958', *International and Comparative Law Quarterly*, 7 (1958), pp. 514, 551.

⁵⁶ Ibid. The UK delegate to the UN General Assembly's Sixth (Legal) Committee has also expressed the view that a State that renders aid for commission of an internationally wrongful act violates international law: *GAOR*, 33rd Session, Sixth Committee, 37th meeting, at p. 7, para. 18, UN Doc. A/C.6/33/SR.37 (1978).

⁵⁷ For discussion of the culpability element of Article 2 (5), see p. 118 nn. 212–14 below.

⁵⁸ J. L. Buckley, Under-Secretary of State for Security Assistance, Science and Technology, Statement before the Senate Foreign Relations Committee, 5 February 1982, *Department of State Bulletin*, April 1982, at p. 84.

⁵⁹ J. J. Kirkpatrick, US Permanent Representative to the UN, General Assembly, 19 October 1981, *ibid.*, January 1982, at p. 78.

⁶⁰ *Ibid.*, at p. 79.

Central America also has become a dangerous point of tension in East-West relations. The Soviet Union cannot escape responsibility for the violence and suffering in the region caused by its support for Cuban activities in Central America and its accelerated transfer of advanced military equipment to Cuba.⁶¹

The UN General Assembly charged complicity for providing aid to an alleged aggressor in a 1983 resolution in which it found Israel responsible for aggression. The Assembly

declare[d], accordingly, the international responsibility of any party or parties that supply Israel with arms or economic aid that augment its war potential.⁶²

Donor States have recognized the illegality of providing aid that would be used for aggressive purposes by stipulating with donee States that contributed resources should not be used for aggression and by cutting off aid that is being used to perpetrate aggression.⁶³ The US specifies that material provided to other States may be used

solely for internal security, for legitimate self-defense, to permit the recipient country to participate in regional or collective arrangements or measures consistent with the Charter of the United Nations, or otherwise to permit the recipient country to participate in collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security . . .⁶⁴

US assistance agreements with recipient States require the recipient to comply with these restrictions.⁶⁵

⁶¹ Commencement address at Eureka College, Peoria, Ill., 9 May 1982, *ibid.*, June 1982, at pp. 34, 35. In an executive order instituting a trade embargo against Nicaragua, President Reagan charged unnamed States with complicity and indicated that the sanctions were aimed both at Nicaragua and at those States: 'US application of these sanctions should be seen by the Government of Nicaragua, and by those who abet it, as unmistakable evidence that we take seriously the obligation to protect our security interests and those of our friends': *New York Times*, 2 May 1985, at p. 6, col. 4.

⁶² GA Res. 38/180 (E), para. 1 (102nd plenary meeting), 19 December 1983. In a 1982 resolution on acts by Israel in Palestinian territories occupied by Israel in 1967 the Assembly 'urge[d] all Governments which have not yet done so: . . . To renounce the policy of providing Israel with military, economic and political assistance, thus discouraging Israel from continuing its aggression, occupation and disregard of its obligations under the Charter and the relevant resolutions of the UN: 'Question of Palestine', GA Res. ES-7/4, para. 9 (b) (31st plenary meeting), 19 August 1982. The vote on the resolution was 120 in favour, 2 against (US and Israel), with 20 abstentions: *New York Times*, 20 August 1982, at p. A11, col. 5. The States opposing and abstaining do not necessarily disagree with the principle that it is unlawful to aid illegal conduct.

⁶³ For a comparison of Netherlands and US legislation on aid to States that violate human rights, see A. Cassese, 'Foreign Economic Assistance and Human Rights—Two Different Approaches', *Human Rights Review*, 4 (1979), p. 41.

⁶⁴ 22 USCA, section 2754. Identical language appears in 22 USCA, section 2302.

⁶⁵ See, e.g., Mutual Defense Assistance Treaty, 23 July 1952, US-Israel, para. 2, *United States Treaties and Other International Agreements* (hereinafter *UST*), vol. 3, p. 4985, *Treaties and Other International Acts Series* (hereinafter *TIAS*), No. 2675, *United Nations Treaty Series* (hereinafter *UNTS*), vol. 179, p. 139; Sale of Military Equipment, Materials and Services, 13 August 1958, US-Indonesia, para. 2 (A), *UST*, vol. 9, p. 1149, *TIAS*, No. 4095, *UNTS*, vol. 335, p. 187; Bilateral Military Assistance Agreement, 23 April 1954, US-Nicaragua, Article 1 (1), *UST*, vol. 5, p. 453, *TIAS*, No. 2940, *UNTS*, vol. 229, p. 37; Military Assistance Agreement, 10 May 1964, US-Argentina, Article 1 (4), *UST*, vol. 15, p. 719, *TIAS*, No. 5594, *UNTS*, vol. 527, p. 77;

The US has invoked these restrictions in case of breach. Following the 1982 Israeli invasion of Lebanon, the State Department sent a letter to Congress informing it that Israel's use of a wide range of US-supplied weapons might be in violation of the Arms Export Control Act since the Department viewed the invasion as aggression.⁶⁶ The US suspended sale of F-16 jet aircraft to Israel at that time because of the invasion.⁶⁷

The US cut off military aid to Indonesia for six months in 1975-6, as a response to Indonesia's military intervention in East Timor. The State Department said that the intervention raised a question of 'uses of US-furnished equipment under applicable US law and agreements between the United States and Indonesia'.⁶⁸ In 1964 and again in 1967, the US threatened to terminate aid to Turkey to forestall possible Turkish aggression against Cyprus.⁶⁹ The US Congress cut military aid to Turkey after it invaded Cyprus in 1974.⁷⁰

(ii) *Aid used to violate rules of warfare.* States have recognized a duty not to facilitate violation by other States of the humanitarian law of war. Provision of material used by another State to violate rules of warfare has engendered protest by States. Donor States have cut off supply of such materials upon learning of the wrongful use. Iran in 1984 lodged a protest based upon the premiss of complicity against the UK for violation of the rules of warfare. It charged the UK with supplying to Iraq chemical weapons which it alleged Iraq had used against Iranian troops.⁷¹ Iran characterized the UK's alleged provision of the weapons as a 'criminal

Agreement between the USA and Guatemala (transfer of military equipment), 30 July 1954, para. 2, *UST*, vol. 5, p. 1926, *TIAS*, No. 3059, *UNTS*, vol. 234, p. 235; Bilateral Military Assistance Agreement, 18 June 1955, US-Guatemala, Article 1 (1), *UST*, vol. 6, p. 2107, *TIAS*, No. 2383, *UNTS*, vol. 262, p. 105; Sale of Military Equipment, Materials and Services, 13 August 1958, US-Indonesia, para. 2 (A), *UST*, vol. 9, p. 1149, *TIAS*, No. 4095, *UNTS*, vol. 335, p. 187. See also Agreement (space co-operation), 31 July 1969, US-Japan, *UST*, vol. 20, p. 2720, *TIAS*, No. 6735, and Agreement (space co-operation: launch assistance), 3 December 1980, US-Japan, *TIAS*, No. 9940 (both requiring Japan to use space vehicles provided by US only for peaceful purposes).

⁶⁶ *Washington Post*, 20 July 1982, at p. A10, col. 2. Representatives Mary Rose Oakar and Nick J. Rahall introduced in the House of Representatives a resolution calling for termination of US military aid to Middle Eastern countries if it were determined that US military equipment was being used for aggressive purposes: *New York Times*, 21 July 1982, at p. A8, col. 6.

⁶⁷ *Ibid.*, 18 April 1983, at p. 1, col. 6.

⁶⁸ Statement of George H. Aldrich, Deputy Legal Adviser, US Department of State, before the Subcommittee on International Organizations, Committee on International Relations, US House of Representatives, 19 July 1977, *Department of State Bulletin*, 5 September 1977, at pp. 324-6. For the US-Indonesia military aid treaty requiring that aid should not be used for aggression, see p. 89 n. 65 above.

⁶⁹ *New York Times*, 9 September 1974, at p. A8, cols. 5-6.

⁷⁰ *Ibid.*, 17 October 1974, at p. A1, col. 2. The reason was Turkey's violation of its agreement with the US not to use the arms offensively: *ibid.* 20 October 1974, at p. E2, col. 1. See also *Washington Post*, 15 June 1975, at p. C3, col. 5, citing the invocation by members of Congress of the legislative prohibition against use of contributed arms for offensive purposes as the basis of the action to terminate aid to Turkey. On the aid cut to Turkey, see also T. Balmer, 'The Use of Conditions in Foreign Relations Legislation', *Denver Journal of International Law and Policy*, 7 (1978), p. 197, at pp. 215-24.

⁷¹ *New York Times*, 6 March 1984, at p. A6, col. 3.

act'. The UK denied the charge.⁷² Following publication of a UN inspection team report that Iraq had so used chemical weapons, the US and several European States cut off sales to Iraq of chemicals that could be employed to make such weapons.⁷³

Upon learning that Israel had used US-supplied cluster bombs in Lebanon, injuring civilians, the US suspended further shipment of the bombs to Israel while it investigated Israel's use of them.⁷⁴ The US and Israel had reportedly concluded an unpublished agreement that bars use of cluster bombs in civilian areas, as such bombs can cause considerable injury to civilians with small particles of flying metal.⁷⁵

The four 1949 Geneva humanitarian conventions oblige States parties to ensure that other States parties abide by these conventions. Article 1, common to the four conventions, requires States to 'ensure respect for the present Convention in all circumstances'.⁷⁶ This obligation prohibits assisting an unlawful act but requires States, in addition, to endeavour to bring an offending State into compliance. According to the Red Cross commentary, common Article 1 requires

that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.⁷⁷

The UN Commission on Human Rights cited Article 1 in calling on States not to aid Israel in annexing and colonizing territory under its

⁷² *The Times*, 5 March 1984, at p. 1, col. 6.

⁷³ On the UN report, see *New York Times*, 27 March 1984, at p. A5, col. 1. On the US cut-off, see *ibid.* 31 March 1984, at p. 1, col. 5. On West Germany's cut-off, see *The Times*, 28 September 1984, at p. 5, col. 1. On the UK cut-off, see *ibid.* 13 April 1984, at p. 1, col. 2. On the European Economic Community cut-off, see *ibid.* 16 May 1984, at p. 6, col. 1.

⁷⁴ *Washington Post*, 29 July 1982, at p. A1, col. 3.

⁷⁵ *Ibid.*; *New York Times*, 19 July 1982, at p. A7, col. 1. See also J. Stephens, *The Israeli Use of U.S. Weapons in Lebanon* (1983).

⁷⁶ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, *UST*, vol. 6, p. 3114, *TIAS*, No. 3362, *UNTS*, vol. 75, p. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, *UST*, vol. 6, p. 3217, *TIAS*, No. 3363, *UNTS*, vol. 75, p. 85; Convention relative to the Treatment of Prisoners of War, 12 August 1949, *UST*, vol. 6, p. 3316, *TIAS*, No. 3364, *UNTS*, vol. 75, p. 135; Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, *UST*, vol. 6, p. 3516, *TIAS*, No. 3365, *UNTS*, vol. 75, p. 287. A similar provision appears in Protocol I to the four Geneva Conventions: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 1, para. 1, UN Doc. A/32/144/Annex 1 (1977). Construing common Article 1 to this same effect are S. V. and W. T. Mallison, *Settlements and the Law: A Juridical Analysis of the Israeli Settlements in the Occupied Territories* (1982), p. 25. The Mallisons write: 'It means that if any one of the parties to each Convention violates it, the other State parties are also in violation until they take necessary measures to ensure that the violating party respects it.' But see ICJ view, *loc. cit.* above (p. 80 n. 15).

⁷⁷ J. S. Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), p. 16.

military occupation. After asserting that Israel had violated the Convention by annexing and colonizing such areas, the Commission

Reiterate[d] its call to all states, in particular the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War, in accordance with article 1 of that Convention, . . . to avoid . . . extending any aid which might be used by Israel in its pursuit of the policies of annexation and colonization or any other policies and practices referred to in the present resolution.⁷⁸

The common Article 1 represents State practice of all States parties to the four conventions to the effect that facilitating a violation of humanitarian norms is itself a violation of norms of State responsibility.

The Security Council utilized the concept of complicity by means of aid in a 1980 resolution on Israeli settlements in occupied Palestinian territory. After stating that the settlements violated international law, the Council unanimously

call[ed] upon all States not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories.⁷⁹

(iii) *Aid used to violate human rights.* The complicity concept has been invoked against giving aid to a State that commits gross violations of human rights. Ago wrote:

Complicity may, for example, also take the form of provision of weapons or other supplies to assist another State to commit genocide, to support a regime of apartheid, or to maintain colonial domination by force, etc.⁸⁰

The UN Security Council in two resolutions called for an economic boycott of Southern Rhodesia in reaction to the establishment of a racial-minority administration there.⁸¹ One resolution called on States 'not to render financial or other economic aid to the illegal racist regime in Southern Rhodesia'.⁸² The rationale behind that provision was that the government of Southern Rhodesia was committing an internationally wrongful act by maintaining a racial-minority administration and that economic aid would facilitate that illegality.⁸³ Nearly all UN member States complied with the boycott.⁸⁴

⁷⁸ UN Human Rights Commission Res. 1984/1, para. 12, 20 February 1984.

⁷⁹ SC Res. 465, 1 March 1980, *SCOR*, 35th Session, 2203rd meeting, at p. 405, para. 7, UN Doc. S/INF/36 (1980).

⁸⁰ Ago, loc. cit. above (p. 82 n. 21), at p. 58.

⁸¹ SC Res. 232, 16 December 1966, *SCOR*, 21st Session, 1340th meeting, at p. 7, UN Doc. S/INF/21/Rev. 1 (1966), reprinted in *International Legal Materials*, 6 (1967), p. 141; and SC Res. 253, 29 May 1968, *SCOR*, 23rd Session, 1428th meeting, at p. 5, UN Doc. S/INF/23/Rev. 1 (1968), reprinted in *International Legal Materials*, 7 (1968), p. 897.

⁸² SC Res. 232, loc. cit. (previous note), para. 5.

⁸³ Ju. A. Reshetov argues that aid to a government practising *apartheid* constitutes a violation of ILC Draft Article 27, as aid for an illegal act: Reshetov, 'Razvitie printsipa mezhdunarodno-pravovoi otvetstvennosti gosudarstv i usilenie bor'by s mezhdunarodnymi prestupleniyami' ('Development of the Principle of the International Legal Responsibility of States and the Strengthening of the Struggle Against International Crimes'), *Soviet Year Book of International Law*, 1980, p. 265.

⁸⁴ A. Chayes, T. Ehrlich, A. Lowenfeld, *International Legal Process* (1969), vol. 2, p. 1386.

The General Assembly invoked complicity in relation to aid to Guatemala, urging governments 'to refrain from supplying arms and other military assistance as long as serious human rights violations in Guatemala continue to be reported'.⁸⁵ The Assembly also called on States 'to refrain from the supply of arms and other military assistance to El Salvador' because of what it found to be serious human rights violations.⁸⁶

According to a Congressional enactment, US military aid is not to be provided to

any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.⁸⁷

This legislation has been invoked by the US to terminate sale of armaments and police weapons to a number of States.⁸⁸ The US has also adopted legislation that requires termination of economic (non-military) aid to States that violate human rights.⁸⁹

Donor States have terminated aid to States violating human rights. A number of States terminated aid to Chile in 1973, citing human rights violations. In response to a UN inquiry,

the vast majority of the States which have commented on their behaviour vis-à-vis Chile in the field of economic relations after 11 September 1973, have pointed out that they have either refused or substantially decreased their economic assistance to Chile, as a direct consequence of the suppression of civil and political rights in that country carried out by the present authorities. Thus, the introduction of a repressive system in Chile has resulted in a vast segment of the international community denying economic aid to Chile, with a view to bringing pressure to bear on the present Chilean authorities for a restoration of human rights in that country.⁹⁰

⁸⁵ GA Res. A/37/745 XVII, 17 December 1982.

⁸⁶ 'Situation of Human Rights and Fundamental Freedoms in El Salvador', 15 December 1980, Draft Res. IX. The vote was 70-12-55.

⁸⁷ 22 USCA section 2304. The US Government is also required by statute to seek, in voting on assistance in international lending institutions, to channel aid to States that do not engage in 'a consistent pattern of gross violations of internationally recognized human rights': 22 USCA, section 262(d) (a) (1). The Netherlands also considers human rights in distributing development aid. According to an explanatory memorandum accompanying its 1975 Development Co-operation Budget, 'particular attention will also be paid to the policy being pursued with regard to human rights': Cassese, loc. cit. above (p. 89 n. 63), at p. 44.

⁸⁸ Statement of Mark L. Schneider, Deputy Assistant Secretary for Human Rights, before the Subcommittee on International Organizations of the International Relations Committee, US House of Representatives, 25 October 1977, *Department of State Bulletin*, 5 December 1977, at pp. 829, 831; *New York Times*, 18 July 1977, at p. 3, cols. 3-4.

⁸⁹ 22 USCA section 2151n. In 1977 the US reduced military aid to Ethiopia, Uruguay and Argentina because of human rights violations it found to be occurring in those States: 'Human Rights', *Congressional Quarterly Almanac*, 33 (1977), pp. 321-2; *New York Times*, 25 February 1977, at p. A1, col. 6. Agreements to finance sale of agricultural commodities are not to be concluded with States committing gross violations of human rights: 7 USCA, section 1712 (a).

⁹⁰ 'Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile', Sub-Commission on Prevention of Discrimination and Protection of Minorities, vol. 31, p. 89, para. 419, UN Doc. E/CN.4/Sub.2/412 (1978). On the 1973 Chile aid cut-offs, see generally A. Cassese, 'Foreign Economic Assistance and Respect for Civil and Political Rights: Chile—A Case Study', *Texas International Law Journal*, 14 (1979), pp. 251-63.

Belgium stated that 'since the coup d'état of 11 September 1973, Belgium has refrained from supplying military or financial aid to Chile' and that 'the position of the Belgian Department of Foreign Affairs will remain unchanged until the rule of law is restored and human rights are fully re-established in Chile'.⁹¹ The UK said that it had 'taken a series of measures aimed at exerting pressure on the military regime in Chile over human rights', including 'a ban on all arms supplies', 'suspension of British aid', and 'denial of debt re-scheduling facilities'.⁹² The FRG stated that since it 'advocates the protection of human rights in all parts of the world' it 'has not provided Chile with any more development aid. It has discontinued supplies of weapons and military equipment'.⁹³

Italy stated that as a result of Chile's refusal to observe UN calls 'for respect for human rights and the restoration of fundamental freedoms' it had 'suspended the privileges enjoyed by Chile under the Insurance and Export Credit Law' and had 'cut off bilateral technical co-operation'. It stated that at that time 'official aid by Italy to the Chilean Government is virtually non-existent'.⁹⁴

The Netherlands stated that it had taken

a number of concrete steps which it hopes will contribute to the restoration and safeguarding of human rights and fundamental freedoms in Chile. Financial assistance in the framework of development co-operation has been suspended. . . . In the field of trade, credit guarantees by governmental bodies for export transactions by Dutch companies have been discontinued as from 1973.⁹⁵

Norway stated that it had suspended bilateral aid because of human rights violations in Chile.⁹⁶

In voting on loans in international lending agencies, States have cast negative votes because of human rights violations by the prospective loan recipient.⁹⁷ US legislation requires US representatives in such agencies to 'advance the cause of human rights, including by seeking to channel assistance toward countries other than those whose governments engage in a consistent pattern of gross violations of internationally recognized human rights . . .'.⁹⁸

⁹¹ 'Study of the Impact . . .', loc. cit. (previous note), at p. 86, para. 414.

⁹² Report of the Economic and Social Council: 'Protection of Human Rights in Chile, Report of the Secretary-General', *GAOR*, 32nd Session, pp. 17-18, UN Doc. A/32/234 (1977).

⁹³ *Ibid.*, at p. 9.

⁹⁴ 'Study of the Impact . . .', loc. cit. above (p. 93 n. 90), at pp. 84-5, para. 407.

⁹⁵ Report of the Economic and Social Council, loc. cit. above (n. 92), at pp. 12-13.

⁹⁶ 'Study of the Impact . . .', loc. cit. above (p. 93 n. 90), at p. 86, para. 410.

⁹⁷ With respect to voting on loans for Chile, 'on many occasions Member States have cast a negative vote or have abstained when a vote was taken on loans or development projects for Chile. The reason given for this attitude was the persistent gross disregard for human rights in Chile': *ibid.* at p. 89, para. 418. Belgium stated that it 'has systematically taken a negative position concerning loans to that country [Chile]': *ibid.* at p. 86, para. 414. Italy stated that its position on the same issue 'has always been negative': *ibid.* at p. 85, para. 407. Norway stated that it 'has voted against loans to Chile from the World Bank': *ibid.* at p. 86, para. 410.

⁹⁸ 22 USCA, section 262d (a) (1). A US State Department official stated that the Department

The States terminating aid to Chile stated that they were doing so because of Chile's human rights violations. They did not expressly state that they considered themselves to be under an obligation to terminate aid. Yet that is the implication of their action. These States did not desire to contribute to the rights violations. To continue to provide aid would implicate them in those violations.

(b) *Assessment of the State Practice*

The ILC has concluded that a complicity norm has entered into customary law. It writes:

Examples taken from the recent practice of States show, moreover, that, whatever may have been the situation formerly, the idea of participation in the internationally wrongful act of another by providing 'aid or assistance', and thus, in this sense, of 'complicity', has now become accepted in international law.⁹⁹

That conclusion represents the view of many highly qualified publicists.¹⁰⁰ It probably represents more than that because ILC members, while serving in their individual capacities, are nominated by their governments and generally reflect the views of their governments.¹⁰¹

Few other publicists, however, have discussed the issue, and these only in recent years. In 1962 Tunkin stated quite tentatively and without further explanation: 'There is no exact indication that the concepts of guilt and complicity are inapplicable to a state as a subject of international law.'¹⁰² In 1975 Graefrath, Oeser and Steiniger asserted the existence of had implemented this legislation, indicating that in voting in international financial institutions 'we have opposed or sought reconsideration of loans to governments engaged in serious violations [of human rights]': Schneider testimony, loc. cit above (p. 93 n. 88), at p. 831.

⁹⁹ Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at p. 252, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 103, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2). It is possible as well that complicity might be considered to constitute one of the 'general principles of law' referred to in Article 38(1) of the Statute of the International Court of Justice. Such is suggested, with invocation of complicity as it exists in domestic legal systems, by F. Boyle, 'Destructive Engagement in Southern Africa', *International Practitioner's Notebook*, 29 (January 1985), p. 34. An international tribunal might well conclude that complicity is such a 'general principle', though State practice seems to have established complicity as a customary norm.

¹⁰⁰ ICJ Statute, Article 38, para. 1 (d).

¹⁰¹ Judge Jennings writes: 'Candidature for membership of the International Law Commission depends upon straight governmental nomination. More and more members are or have been official or unofficial governmental legal advisers. Though they are there for the most part in their own right on purely scientific grounds, they do represent also a confrontation on the scientific plane of the varied interests of different States; a glance almost anywhere in the verbatim proceedings will demonstrate this': 'Recent Developments in the International Law Commission: Its Relation to the Sources of International Law', *International and Comparative Law Quarterly*, 13 (1964), pp. 385, 390. In the *North Sea Continental Shelf* cases, Judges Tanaka and Sorensen, dissenting, argued that the 1958 Convention on the Continental Shelf's equidistance principle (for delimitation of shelves between adjoining States) had become a customary norm. To support that view, they cited the fact that the Convention had been drafted by the ILC: *ICJ Reports*, 1969, pp. 178, 245-7.

¹⁰² Tunkin, *Voprosy teorii mezhdunarodnogo prava (Problems of the Theory of International Law)* (1962), p. 275. The same sentence appears in the second edition, titled *Teoriia mezhdunarodnogo prava (Theory of International Law)* (1970), which appeared in English translation by W. E. Butler as *Theory of International Law* (1974), where the quoted language appears at p. 403.

a complicity norm, again without explanation of the reasoning behind their conclusion.¹⁰³

Only after the appearance of the ILC draft article on complicity did extended treatment appear in the literature. Graefrath and Oeser, commenting in 1980 on ILC Article 27, affirmed the existence of a complicity norm and discussed in detail its culpability element.¹⁰⁴ In his 1983 treatise on State responsibility, Soviet ILC member Ushakov devoted a chapter to complicity, focusing on Article 27.¹⁰⁵ But Graefrath, Oeser and Ushakov did not cite State practice on complicity or otherwise to explain their conclusion that complicity had emerged as a customary norm. They limited themselves to commenting on Article 27.

As indicated, Mr Lauterpacht, commenting on a situation of provision of arms to an alleged aggressor State, affirmed that such provision of arms is wrongful.¹⁰⁶ Brownlie concurs.¹⁰⁷ Is State practice sufficiently consistent on the issue? Has that practice existed over a sufficient time period? Has there emerged an *opinio juris* to turn the State practice into a customary norm?

1. *Time span of the State practice*

The fact that State practice commenced only in the 1950s does not preclude emergence of complicity as a customary norm. In the *North Sea Continental Shelf* cases, the International Court of Justice indicated that a customary norm may develop in a short time.¹⁰⁸ The Court there was considering an argument that a customary norm had developed within about twenty years and suggested that with a period of such short duration State practice would need to be 'extensive and virtually uniform'.¹⁰⁹ But in the *Fisheries Jurisdiction* case it found a custom to have developed in twelve years (between the 1960 Law of the Sea Conference and 1972) on the basis of practice that was far from uniform.¹¹⁰ Some writers have suggested that a customary norm permitting a State to fly a satellite over the territory of another State developed in a very short time, after the US and USSR launched satellites in the late 1950s.¹¹¹ Baxter writes that the time factor

¹⁰³ B. Graefrath, E. Oeser, P. A. Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten* (1977), p. 64. (The text of the book was given to the publisher on 31 December 1975.)

¹⁰⁴ B. Graefrath, E. Oeser, 'Teilnahmeformen bei der völkerrechtlichen Verantwortlichkeit', *Staat und Recht*, 29 (1980), pp. 446-8.

¹⁰⁵ Ushakov, op. cit. above (p. 78 n. 2), at pp. 145-54.

¹⁰⁶ Loc. cit. above, p. 88 n. 55.

¹⁰⁷ Op. cit. above (p. 79 n. 11), at p. 191.

¹⁰⁸ *North Sea Continental Shelf* (FRG v. Denmark, FRG v. Netherlands), *ICJ Reports*, 1969, pp. 42-3. On the issue of the time period necessary for formation of a customary norm, see D'Amato, op. cit. above (p. 81 n. 20), at pp. 56-66. D'Amato too indicates that a customary norm can emerge quickly: *ibid* at p. 64.

¹⁰⁹ Loc. cit. (previous note), p. 44, para. 74.

¹¹⁰ *Fisheries Jurisdiction* (UK v. Iceland), *ICJ Reports*, 1974, p. 3 (judgment of 25 July 1974, *Merits*).

¹¹¹ For additional authority that time is not an important factor see H. Meijers, 'How is International Law Made?—The Stages of Growth of International Law and the Use of its Customary Rules', *Netherlands Yearbook of International Law*, 9 (1978), pp. 3, 25. McNair argues that a

is now 'irrelevant', that a rule forms 'as soon as it acquires the necessary degree of acceptance'.¹¹²

With the emergence of international fora for the elaboration of international law, the time period for development of a customary norm has been reduced considerably. Through such fora, State practice is expressed in views given on topics under discussion and in votes on resolutions. Higgins writes:

With the development of international organizations, the votes and views of states have come to have legal significance as evidence of customary law. Moreover, the practice of states comprises their collective acts as well as the total of their individual acts; . . .¹¹³

2. *Opinio juris*

The State practice reviewed above reveals that States have formed the conviction that they are forbidden by international law to provide material aid to other States for the commission of internationally wrongful acts.¹¹⁴ *Opinio juris* with respect to complicity is indicated by the protests and other charges made by States and responses to them, by the decisions and resolutions of UN organs, by the International Court of Justice in the 1971 *Namibia* case, by the practice of States in refraining from aiding wrongful acts of other States and by statements of representatives of States in the General Assembly's Sixth Committee.

The protests made by States charging complicity have manifested a conviction of the protesting State that the allegedly complicit State has violated a legal obligation. When the UK protested to Yemen for having permitted Egyptian aircraft to use Yemeni territory for allegedly aggressive attacks against British territory, it based its protest on the ground that it was wrongful for Yemen to permit its territory to be so used.¹¹⁵

Iran, in charging the UK with providing Iraq with ingredients for chemical weapons, described the UK's role as a 'criminal act'.¹¹⁶ The US

customary norm permitting a State to send a satellite over the territory of another developed very rapidly after the first satellites were launched in the late 1950s, since no State protested at the overflights: McNair, *Law of the Air* (3rd edn., 1964), p. 17.

¹¹² R. Baxter, 'Treaties and Custom', *Recueil des cours*, 129 (1970-I), p. 67. In accord is Tunkin, op. cit. above (p. 78 n. 6), at pp. 114-15.

¹¹³ R. Higgins, *Development of International Law through the Political Organs of the United Nations* (1963), p. 2. The International Court of Justice has also given weight in determining the existence of a customary norm to decisions made at international conferences and to views expressed there: *Fisheries Jurisdiction (UK v. Iceland)*, ICJ Reports, 1974, pp. 23-4 (judgment of 25 July 1974, *Merits*).

¹¹⁴ 'The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough': *North Sea Continental Shelf*, loc. cit. above (p. 96 n. 108), at p. 44. Judges Tanaka and Lachs thought the Court too strict; they cited the difficulty of finding *opinio juris*: ibid. at pp. 176 and 231. For a survey of views on *opinio juris*, see Wolfke, op. cit. above (p. 81 n. 20), at pp. 50-8.

¹¹⁵ Loc. cit. above (p. 84 n. 32).

¹¹⁶ Loc. cit. above (p. 91 n. 72).

has stated that the USSR 'cannot escape responsibility for the violence' allegedly perpetrated by Cuba with Soviet material support.¹¹⁷

The USSR described the US as an 'accomplice' in alleged aggression by Israel in Lebanon in 1982.¹¹⁸ In its 1958 protest to the FRG over US use of FRG air-bases to fly troops to Lebanon, the USSR accused the FRG of supporting aggression.¹¹⁹ It called upon the FRG and Italy to take 'effective measures' to ensure that their territories were not used 'for purposes of aggression'.¹²⁰ The USSR accused Israel of being a 'direct accomplice' in aggression allegedly perpetrated by the US and UK against Jordan in 1958.¹²¹

The allegedly complicit States have never questioned the protesting State's assertion that the conduct alleged to have aided the principal State would be wrongful. The FRG and Turkey, responding to the USSR's charge of having permitted the US to launch balloons that violated Soviet air space, denied that the US activity was wrongful.¹²²

Opinio juris on complicity is also reflected in the work of the UN Security Council and General Assembly. Resolutions and decisions embodying complicity manifest the view of the States supporting those resolutions and decisions that the allegedly complicit conduct is wrongful. While the resolutions and decisions have not used the term 'complicity', they manifest a conviction that the conduct from which they call on States to refrain is wrongful. Thus the Security Council, in calling on States to refrain from sending diplomatic missions to or entering into economic dealings with South Africa in such a way as to imply recognition of its control over Namibia, indicated a conviction that States engaging in such conduct would themselves be acting wrongfully.¹²³ The Human Rights Commission, in opposing provision to Israel of aid that would be used for annexation or colonization in territories occupied by Israel, manifested a conviction that States providing such aid would be acting wrongfully. That conclusion is reinforced by the fact that the resolution refers to the obligation of States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War to ensure compliance with the Convention by other States parties, Israel being a State party.¹²⁴

The General Assembly, in calling on States 'to renounce . . . providing Israel with military, economic and political assistance', asserted that such withholding of aid would 'discourage Israel from continuing its aggression, occupation and disregard of its obligations under the Charter', thus implying that an aid-giving State would be acting wrongfully since it would be promoting wrongful acts by Israel.¹²⁵

¹¹⁷ Loc. cit. above (p. 89 n. 61).

¹¹⁸ Loc. cit. above (p. 86 n. 46).

¹¹⁹ Loc. cit. above (p. 83 n. 28).

¹²⁰ *Keesing's Contemporary Archives*, p. 16334 (1958).

¹²¹ Loc. cit. above (p. 84 n. 31).

¹²² Loc. cit. above (p. 83 n. 29 and p. 85 n. 40).

¹²³ Loc. cit. above (p. 87 n. 50).

¹²⁴ Loc. cit. above (p. 92 n. 78).

¹²⁵ Loc. cit. above (p. 89 n. 62).

The same implication is found in the Security Council resolution against aid to Israel 'to be used specifically in connection with settlements in the occupied territories'.¹²⁶ The premiss is that it is wrongful to aid the allegedly illegal acts. The same premiss underlies the Security Council's call to States 'not to render financial or other economic aid to the illegal racist regime in Southern Rhodesia'.¹²⁷ It also underlies the General Assembly's call to States to refrain from giving aid to Guatemala or El Salvador because of human rights violations in those States.¹²⁸

The International Court of Justice, in finding that States are obliged to refrain from engaging with South Africa in dealings that imply recognition of its occupation of Namibia, said that, at least in this context, acts that promote the illegal act of another State are themselves wrongful. The Court based its finding on two premisses. First, it found States to be under such an obligation because the Security Council had ordered them not to engage in such dealings, and Article 25 of the UN Charter requires member States to carry out Security Council decisions. Secondly, and more importantly for present purposes, the Court based its finding on 'general international law'.¹²⁹ It thus found in customary law a principle that States are obliged to refrain from aiding the indicated illegal acts of other States.

There is indication in the US legislation barring aid to States violating human rights that the US feels itself obliged to refrain from giving such aid. That legislation calls upon the US President to carry out military aid 'in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms'.¹³⁰ The desire here expressed to avoid identification through aid programmes with governments that violate international law indicates a recognition on the part of the US Congress that providing aid to lawbreakers implicates the aid-giver in their wrongs. An official of the US Department of State indicated that this policy of denying aid to human rights violators was viewed by the US as being required by international law: 'We have based our actions [consideration of human rights violations of other states] on our obligations under the UN Charter and other international commitments . . .'.¹³¹

¹²⁶ Loc. cit. above (p. 92 n. 79).

¹²⁷ Loc. cit. above (p. 92 n. 82).

¹²⁸ Loc. cit. above (p. 93 nn. 85-6).

¹²⁹ Loc. cit. above (p. 87 n. 51).

¹³⁰ 22 USCA section 2304 (a) (3). Construing this language as indicative of a Congressional belief that cessation of aid to rights violators is required by international law, one analyst writes: 'Congress believed this legislation to be required by American self-interest, as well as supported by principles of international law': S. Cohen, 'Conditioning U.S. Security Assistance on Human Rights Practices', *American Journal of International Law*, 76 (1982), p. 246, at p. 247. Cohen writes that cessation of aid to rights violators is required by customary international law: 'These obligations [of a State not to violate human rights] suggest a corresponding duty of one government not to support another engaged in serious violations of internationally recognized human rights': *ibid* at p. 246.

¹³¹ Schneider testimony, loc. cit. above (p. 93 n. 88), at p. 830.

Opinio juris is also seen in State practice reflected in the General Assembly's Sixth (Legal) Committee. A number of States have spoken in the Sixth Committee about ILC Article 27.¹³² Most have indicated support for the principle. It can be inferred from their approving statements that they view complicity as present in customary law. Only a few States suggested that they do not find a complicity norm in customary law. France indicated that it views Article 27 as reflecting progressive development of international law, implying that France does not find such a norm in customary law.¹³³ The Netherlands recommended that Article 27 be limited to international crimes,¹³⁴ a position that suggests that the Netherlands does not find in customary law a complicity norm applicable to all international wrongs. The FRG and Japan both said that the examples cited to demonstrate existence of a complicity norm in customary law reflected independent violations of international law rather than complicity.¹³⁵

Even apart from the foregoing expressions of *opinio juris*, State practice alone on complicity gives rise to an inference of *opinio juris*. This conclusion flows from the jurisprudence of the International Court of Justice on establishment of customary norms. In the *Nottebohm* and *Right of Passage* cases the Court found a custom to exist from State practice alone without separate proof of *opinio juris*. In the *North Sea Continental Shelf* cases, on the contrary, it found a practice but declined to find that practice to constitute a custom for lack of *opinio juris*. The Court there declined to infer *opinio juris* because it found that States had used the equidistance principle (to divide their adjoining continental shelves) for reasons of convenience.¹³⁶

In *Nottebohm*, however, the Court found for the practice (States declining to make international claims in respect of naturalized citizens who have lost factual connection with them) no explanation inconsistent with the presence of *opinio juris*. It inferred from the fact that they do so decline that they consider that they have no right to represent such persons.¹³⁷ Similarly in the *Right of Passage* case, the Court inferred from the practice (successive sovereigns of India for more than a century had permitted Portuguese civilian traffic through Indian territory to and from Portuguese enclaves) that 'the practice was accepted as law by the Parties and has given rise to a right and a correlative obligation'.¹³⁸

In both *Nottebohm* and *Right of Passage* the Court might have endeavoured to speculate that the States in question had acted for reasons

¹³² See pp. 101-2 nn. 140-58 below.

¹³³ GAOR, 33rd Session, Sixth Committee, 42nd meeting, at p. 6, para. 17, UN Doc. A/C.6/33/SR.42 (1978).

¹³⁴ See p. 104 n. 164 below.

¹³⁵ See p. 102 nn. 157-8 below.

¹³⁶ ICJ Reports, 1969, at p. 44.

¹³⁷ ICJ Reports, 1955, p. 22.

¹³⁸ ICJ Reports, 1960, p. 40.

inconsistent with *opinio juris*. In *Nottebohm* it might have suggested that States declining to represent naturalized citizens who have lost factual connection so decline because the representation is burdensome, or because States are not anxious for avoidable controversy. In *Right of Passage*, the Court might have said that the relevant sovereigns permitted Portuguese civilian traffic out of largesse rather than out of a sense of obligation.

These cases indicate that the Court infers *opinio juris* unless there exists some evident reason for the practice inconsistent with *opinio juris*.¹³⁹ With respect to complicity, there exists no such evident reason. From the fact that States assert that others should refrain from aiding illegality, it is logical to infer that they believe that States are obliged so to refrain. One might speculate that they make such assertions on the grounds that it is merely inappropriate policy for States to aid illegality. But there is no compelling reason to engage in such speculation. Here the nature of the practice is relevant. It is a practice with a specifically legal content, involving, by necessary assumption, illegal conduct by the principal State. If States tell others not to aid that illegal conduct they probably believe that as well to be illegal.

While the practice alone warrants an inference of *opinio juris* regarding complicity, there is, as noted, abundant indication of express recognition by States that complicity is forbidden by customary law.

3. *Sufficiency of the State practice*

In the ILC Article 27 has received its strongest support from developing States, which are particularly vulnerable to infringement of their rights, and from socialist States. Unequivocal statements in support of Article 27 were made in the General Assembly's Sixth (Legal) Committee by representatives of Third World States—Jamaica,¹⁴⁰ Kenya,¹⁴¹ Thailand,¹⁴² Indonesia,¹⁴³ Trinidad and Tobago,¹⁴⁴ Bangladesh,¹⁴⁵ Nigeria¹⁴⁶ and Uruguay¹⁴⁷—and East European socialist States—Roumania,¹⁴⁸ Poland,¹⁴⁹ Yugoslavia,¹⁵⁰ Byelorussia,¹⁵¹ Bulgaria¹⁵² and

¹³⁹ Baxter concludes from study of practice that *opinio juris* is presumptively present unless evidence can be adduced that a State was acting from other than a sense of legal obligation: loc. cit. above (p. 97 n. 112), at p. 69.

¹⁴⁰ GAOR, 33rd Session, Sixth Committee, 32nd meeting, at p. 7, para. 22, UN Doc. A/C.6/33/SR.32 (1978).

¹⁴¹ Ibid., 38th meeting, at p. 15, para. 51, UN Doc. A/C.6/33/SR.38 (1978).

¹⁴² Ibid. at p. 5, para. 14.

¹⁴³ Ibid., 41st meeting, at p. 19, para. 67, UN Doc. A/C.6/33/SR.41 (1978).

¹⁴⁴ Ibid., 42nd meeting, at p. 2, para. 2, UN Doc. A/C.6/33/SR.42 (1978).

¹⁴⁵ Ibid. at pp. 10-11, para. 35.

¹⁴⁶ Ibid. at p. 12, para. 41.

¹⁴⁷ Ibid., 43rd meeting, at pp. 9-10, para. 35, UN Doc. A/C.6/33/SR.43 (1978).

¹⁴⁸ Ibid., 38th meeting, at p. 11, para. 37, UN Doc. A/C.6/33/SR.38 (1978).

¹⁴⁹ Ibid. at p. 3, para. 5.

¹⁵⁰ Ibid., 35th meeting, at p. 3, para. 9, UN Doc. A/C.6/33/SR.35 (1978).

¹⁵¹ Ibid., 39th meeting, at p. 9, para. 34, UN Doc. A/C.6/33/SR.39 (1978).

¹⁵² Ibid., 40th meeting, at p. 7, para. 28, UN Doc. A/C.6/33/SR.40 (1978).

Czechoslovakia.¹⁵³ While no developing States criticized Article 27, a number of Western developed States did, and none expressed unqualified support. The US objected that Article 27 expresses a 'primary rule', in violation of an ILC understanding not to write the substantive law of State responsibility into the draft but only to state the law relating to how violations of that body of law should be handled. The US delegate referred to the Netherlands critique to that effect as a 'trenchant commentary' that 'merited further study'.¹⁵⁴

France also criticized Article 27 as being a 'primary rule' and stated that the article would develop, rather than codify, international law, an indication that France does not think that it is found in customary international law.¹⁵⁵ The UK agreed with the complicity concept but feared that the culpability standard ('for the commission') was too imprecise.¹⁵⁶

The FRG's delegate 'wondered whether the draft provision was really in accord with applicable customary international law. Many of the situations quoted as examples of aid and assistance', he stated, 'referred to breaches of independent obligations under international law'. Viewing Article 27 as creating a 'new obligation', he 'warned that actions which were admissible under current rules of neutrality might give rise to counter-measures or claims because they constituted acts of aid and assistance'. He objected that it is inappropriate to use a subjective element (the purpose for which aid is rendered) in setting international liability and questioned whether it is appropriate to include in international law a concept that derives from domestic penal law.¹⁵⁷ Japan's delegate predicted that Article 27 would have little application, as many instances where a State aids a violation committed by another State are already covered as a direct violation of international law.¹⁵⁸

The more powerful States seem wary of complicity, perhaps because they are more likely to be violators, but they have not clearly opposed complicity. As indicated above, they have acknowledged it in their practice.

The International Court of Justice has not followed a strict positivist approach to determining the existence of customary norms. In the *Fisheries Jurisdiction* case, for example, the Court found a customary norm allowing a 50-mile preferential fishing zone on considerably less State practice than exists with respect to complicity.¹⁵⁹ Contrary to the view of strict positivists,¹⁶⁰ international customary norms have frequently been

¹⁵³ GAOR, 33rd Session, Sixth Committee, 41st meeting, at p. 15, para. 55, UN Doc. A/C.6/33/SR.41 (1978).

¹⁵⁴ Ibid., 40th meeting, at p. 2, para. 4, UN Doc. A/C.6/33/SR.40 (1978).

¹⁵⁵ Ibid., 42nd meeting, at p. 6, para. 17, UN Doc. A/C.6/33/SR.42 (1978).

¹⁵⁶ Ibid., 37th meeting, at p. 7, para. 18, UN Doc. A/C.6/33/SR.37 (1978). The Austrian delegate also called for tightening of the culpability standard: *ibid.* at p. 2, para. 3.

¹⁵⁷ Ibid., 42nd meeting, at p. 7, para. 58, UN Doc. A/C.6/33/SR.42 (1978).

¹⁵⁸ Ibid., 37th meeting, at p. 13, para. 47, UN Doc. A/C.6/33/SR.37 (1978).

¹⁵⁹ *ICJ Reports*, 1974, p. 3 at p. 23.

¹⁶⁰ Tunkin, *op. cit.* above (p. 78 n. 6), at pp. 126-8.

found to exist on State practice that has been less than overwhelming. D'Amato states that writers have discussed the need for 'repetition, duration, constancy, and generality' to establish a customary norm but says they 'have not given any concrete evidence for the loose statements sometimes made that these elements are necessary for the actual *formation* of a rule of customary law'.¹⁶¹

With respect to complicity, in addition to the position of the ILC and of States commenting in the Sixth Committee, there is ample State practice reflected in positions taken by States in asserting violations of the complicity norm and in responding to such assertions. No State responding to such a charge has challenged the existence of the complicity norm. Aid-giving States have recognized by their practice a responsibility for the uses to which their resources or funds are put.

The complicity norm has been invoked, as indicated, by the UN General Assembly, the UN Security Council, the UN Commission on Human Rights and the International Court of Justice. A number of multilateral treaties have invoked it as well.

On the other side, there is no body of practice that rejects the complicity norm. The only reservations are those of certain States that have reacted in the Sixth Committee to the ILC's Article 27. Those States did not assert that a complicity norm is inadmissible in principle, however. As indicated, some objected that the treaty was not to deal with substantive law, which they considered the complicity norm to be. Others said the norm should be restricted to serious violations only.

A complicity norm is required if rights are to be protected. In finding the existence of custom, judges have frequently been influenced by the needs of international society:

Sometimes it is merely the satisfactory and reasonable character of the custom which allows a decision whether a particular rule has or has not the character of a legal rule.¹⁶²

The needs of the international order weigh in favour of recognition of a complicity norm. If one State violates internationally protected rights while another provides it with the means to do so, the assisting State may pose a greater threat to international order, as it will often be the State with greater economic potential to do harm.

The complicity norm began to be invoked in the 1950s and by the 1980s it had become part of common discourse in international relations. The reasons behind that trend are not difficult to identify. Since the Second World War States have been in closer communication owing to improved communications and to development of international organizations.

¹⁶¹ D'Amato, *op. cit.* above (p. 81 n. 20), at p. 66. Emphasis in original.

¹⁶² L. Kopelmanas, 'Custom as a Means of the Creation of International Law', this *Year Book*, 18 (1937), p. 127, at p. 151. See also M. S. McDougal and W. M. Reisman, 'The Prescribing Function in World Constitutive Process: How International Law is Made', *Yale Studies in World Public Order*, vol. 6 (1980), pp. 249, 267.

International law in the post-Second World War period has come to regulate international relations in a more sophisticated fashion. Development of a complicity norm represents a natural gap-filling process. Just as law evolving from ancient times to modern developed more sophisticated doctrines, so international law is developing. As 'delict' eventually split into 'tort' and 'crime', and as 'homicide' eventually split into 'murder' and 'manslaughter', so international norms become more refined. The initial thrust in the law of State responsibility was to outlaw the act of the perpetrator. Outlawing the act of one who assists the perpetrator logically comes at a later stage.

4. *Whether complicity obtains only for international crimes*

Some ILC members have urged that complicity be limited to international crimes, but the ILC has rejected that limitation.¹⁶³ The Netherlands Government argued:

Unlike the Commission, it [the Netherlands Government] does not consider it a matter of course that the conduct of a third State should be considered in every case where one State violates its obligations vis-à-vis another. In principle it would surely be more correct and more practical to restrict the rule in question to serious cases such as crimes referred to in Article 19 [of the ILC draft treaty].¹⁶⁴

The Netherlands raises an important issue. International law has proved only partially effective in keeping States from violating internationally protected rights. The limited success of international fact-finding and adjudication has allowed many States to violate rights without sanction. If international law cannot effectively prevent States from violating rights directly, can it prevent indirect violations? The need for sophisticated fact-finding may be even greater in a complicity violation. Both the violation by the principal and the activity of the aider need to be investigated. The unwillingness of a State charged with a violation can impede any investigation. If two States are charged, the possibility is doubled that unwillingness to co-operate will impede fact-finding. Further, the facts constituting complicity may be subtle. What role did the alleged aid play in the violation? With what intent was the aid given? Was the aider aware of the use to which the aid was to be put? These issues may too sorely tax existing international mechanisms.

¹⁶³ See Judge Sette Camara, noting that Article 27 applies to 'any internationally wrongful act' committed by the principal State: *GAOR*, 33rd Session, Sixth Committee, 27th meeting, at p. 20, para. 64, UN Doc. A/C.6/33/SR.27 (1978). See also Chairman Bavand (Iran) of the Sixth Committee, who noted that some ILC members had suggested limiting Article 27 to international crimes committed by the principal State. Bavand approved the ILC's refusal so to limit Article 27: *ibid.*, 45th meeting, at p. 5, para. 17, UN Doc. A/C.6/33/SR.45 (1978). Riphagen, then the Netherlands member of the ILC, suggested that Article 27 should apply only to commission of serious international wrongs: *ibid.*, 31st meeting, at p. 6, paras. 11, 12, UN Doc. A/C.6/33/SR.31 (1978). Riphagen's statement also appears in *Netherlands Yearbook of International Law*, 11 (1980), p. 230.

¹⁶⁴ 'State Responsibility: Comments and observations of Governments on part one of the draft articles on State responsibility for internationally wrongful acts', *Yearbook of the ILC*, 1982, vol. 2, pt. 1, p. 18, UN Doc. A/CN.4/351/Add. 3 (1982).

The Netherlands proposal is deficient on two counts, however. First, it makes little sense to provide for complicity responsibility only for certain violations but not for others.¹⁶⁵ If a State is liable for aiding an international wrong, it should be liable for aiding any international wrong. Secondly, it is not clear that international mechanisms deal better with serious violations. International mechanisms may deal more effectively with violation of continental shelf rights than with an armed attack.

The approach of the ILC majority—to render a State liable for complicity in commission of any international wrong¹⁶⁶—is in accord with State practice and is better geared to preventing violation of internationally protected rights. Complicity has been invoked, as indicated, in relation to the violation of air space by dispatch of high-altitude balloons, the violation of the rules of warfare and the gross violation of human rights. The 1949 Geneva humanitarian conventions apply complicity to violation of any provision of those conventions, and in State practice it has been applied to violations of the humanitarian law respecting occupied territory.

5. *Whether complicity obtains apart from joint liability*

The situations that first gave rise to what the ILC considered to be instances of complicity liability involved States that permitted their territory to be used by other States as a base for wrongful acts. It is submitted, as suggested above,¹⁶⁷ that those instances constitute complicity liability, even though the distinction was not clearly drawn in State practice.

Many of the situations revealed in subsequent State practice cannot fairly be characterized as joint liability. States that had been giving economic aid to Chile while that government committed substantial human rights violations could not be held liable directly for those violations. Their role is clearly subsidiary to that of Chile. Their aid-giving might promote the violations and therefore should be found unlawful, but their liability is of lesser magnitude. There might ensue lesser consequences as regards reparations or other sanctions.

None the less, it remains difficult to draw a sharp distinction between joint liability and complicity liability. The ILC made it clear that Draft Article 27 does not address co-perpetration.¹⁶⁸ Brownlie addresses the problem:

¹⁶⁵ For discussion of the distinction between international crimes and other international wrongs, see p. 130 below, text accompanying nn. 250–2.

¹⁶⁶ Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at p. 251, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 102, UN Doc. A/CN.4/SER.A/1978/Add. 1 (Pt. 2).

¹⁶⁷ See text accompanying n. 33 at p. 84 above.

¹⁶⁸ The ILC had made it clear that its Draft Article 27 does not cover co-perpetration: Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at p. 243, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 99, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2).

[M]any strong cases of 'aid or assistance' will be primarily classifiable as instances of joint responsibility and it is only in the more marginal cases that a separate category of delict is called for. No doubt the law is undeveloped in this context but the distinction which is to be sought is sufficiently clear.¹⁶⁹

When one asks which acts fall into which category, the difficulty of drawing the line is apparent. Where a State gives economic aid to a human rights violator, only complicity is called for, and where a State is a nearly full partner in aggression, contributing troops and equipment, joint liability is called for. Brownlie suggests examples falling into the two categories:

Thus the supply of weapons, military aircraft, radar equipment, and so forth, would in certain situations amount to 'aid or assistance' in the commission of an act of aggression but would not give rise to joint responsibility. However, the supply of combat units, vehicles, equipment, and personnel, for the specific purpose of assisting an aggressor, would constitute a joint responsibility.¹⁶⁹

These seem clearly to fall in the categories suggested. Using that analysis, one may ask how to classify permitting territory to be used as a base for aggression. It would seem that that act should fall into the complicity category rather than that of joint liability. It is more akin to supplying weapons than it is to full participation in aggression. The need for complicity liability apart from joint liability is clear. Many acts falling short of rendering a State a co-principal involve it in activity that substantially contributes to the wrongful act of another State, such that an international legal prohibition is needed. State practice, as indicated above, has found liability in many such instances. Roumania argued in the Sixth Committee 'that in the case of crimes enumerated in article 19, paragraph 3, it was important to classify the participation and the principal act in the same manner. It would be possible in that connexion to specify in article 27 that the gravity of the principal act also affected the classification of the act of assistance.' Roumania apparently wants to ensure that a State aiding an international crime will be subjected to consequences as severe as those to which the principal State is subjected.¹⁷⁰ This approach is misconceived. Where a State's role is ancillary, it should be deemed complicit only, regardless of the seriousness of the act of the principal.

6. *Whether complicity as an aspect of customary law obtains apart from treaty obligations to avoid complicity*

A number of the instances of State practice recited above involve situations in which States have by treaty assumed an obligation to avoid complicity. Examples are the common Article 1 to the 1949 Geneva humanitarian conventions and Article 2, paragraph 5, of the UN Charter.

¹⁶⁹ Brownlie, *op. cit.* above (p. 79 n. 11), at p. 191.

¹⁷⁰ GAOR, 33rd Session, Sixth Committee, 38th meeting, at p. 11, para. 37, UN Doc. A/C.6/33/SR.38 (1978).

In both situations the States parties have agreed that they will not render aid that might facilitate certain wrongful acts of other States. In common Article 1 they agree to do nothing, whether by material aid or political act or otherwise, to promote violations of the humanitarian rules by other States parties. In Article 2, paragraph 5, of the Charter, they agree to 'refrain from giving assistance' to States against which the UN is taking preventive or enforcement action. In these instances the prohibition against complicity is assumed as a treaty obligation. Yet the inclusion of such anti-complicity provisions in multilateral treaties in itself constitutes State practice on complicity. These anti-complicity provisions contribute to the body of State practice, especially since breach of the treaty obligation may also be a breach of an obligation under general international law.

7. *Whether violation of United Nations sanctions constitutes complicity*

If the UN Security Council decides to impose sanctions against a State committing a wrongful act (e.g. aggression, *apartheid*), States members are obliged under Article 25 of the Charter to comply with that decision. Assume that the Security Council calls on States to terminate diplomatic relations with the offending State. Assume that State A, a UN member, refuses to do so. Would State A be complicit in the act of aggression or *apartheid*?

The answer seems clearly in the negative. The Security Council by decreeing such sanctions is declaring that the State in question is committing a wrongful act. In some measure, the maintenance of diplomatic relations by State A with the offending State encourages continuance of the wrongful act. But the encouragement is too ephemeral to constitute complicity. As indicated above, moral encouragement to a wrongful act is not a violation of State responsibility.¹⁷¹ However, the situation is otherwise if a State gives material aid to a State that is committing aggression or *apartheid*. That State might well be complicit in the aggression or *apartheid*. That complicity liability would derive, however, not from the violation of the UN sanction decision but from the customary-law obligation to avoid facilitating the wrongful act of another State. Whether complicity is present would depend on factors that will be considered in Section IV, below.

IV. ELEMENTS OF COMPLICITY LIABILITY IN A PROGRAMME OF MATERIAL AID

One important area of applicability of the complicity norm is programmes of economic or military assistance. In the post-War era, such programmes have assumed great importance to donee States.¹⁷² They

¹⁷¹ See p. 80 n. 15 above.

¹⁷² C. Okolie, *International Law Perspectives of the Developing Countries: The Relationship of Law*

have in many instances become significant tools of foreign policy for the donor States.¹⁷³ Several of the UN resolutions cited above in discussion of State practice urge cessation of aid being given by a donor State as part of an ongoing aid programme.¹⁷⁴ Attention will not focus here on situations in which the material assistance consists of items whose use is wrongful, e.g. unlawful implements of warfare. It will focus on assistance consisting either of weapons (including ammunition) or of monetary grants or other items whose use could be lawful.

While the contours and scope of the complicity liability of a donor State have yet to be formulated with precision in State practice, certain standards have emerged. The following sections will review those standards and suggest directions for development of the law. It is submitted that the following criteria must be met before a donor State is complicit in unlawful acts of a donee State, where aid is not given expressly to be used by the donee State for the unlawful acts:

- (1) The donor State must provide substantial aid to the donee State;
- (2) The donor State must be aware that the aid will probably facilitate commission by the donee State of a wrongful act;
- (3) The donee State must commit the wrongful act using either material resources contributed by the donor State or others made available to it as a result of its receipt of the assistance from the donor State.

It will then be argued that complicity liability is not negated by a donor State's effort to encourage the donee State to cease the wrongful act if the donor State continues to provide aid. Finally, it will be submitted that it is not a prerequisite for liability that the donor State derives benefit from the wrongful acts of the donee State.

(a) *Attitude of Donor State to a Wrongful Act*

The most difficult issue in determining whether a donor State is complicit is that of the donor's attitude towards a violation. While *culpa* is not uniformly required as a condition of State responsibility, it does appear in certain types of State responsibility. For example, where a State is held responsible for injurious acts of a mob of private citizens, its

and Economic Development to Basic Human Rights (1978); W. Friedman, G. Kalmanoff, R. Meagher, *International Financial Aid* (1966), pp. 8-17.

¹⁷³ US Secretary of State George Shultz quoted approvingly from a study of US foreign aid written by the Commission on Security and Economic Assistance, composed of members of Congress and private citizens: 'The instrumentalities of foreign assistance are potent and essential tools that advance our interests. . . . On balance, it is the judgment of the Commission that U.S. assistance programs make an indispensable contribution to achieving foreign policy objectives.' Shultz cited to the same effect the report of the National Bipartisan Commission on Central America (Kissinger Commission): Statement Before the House Foreign Affairs Subcommittee, 9 February 1984, *Department of State Bulletin*, May 1984, at p. 17. In enumerating US interests in this context, Shultz included, *inter alia*, 'protecting our vital interests abroad, strengthening our friends': *ibid.* at p. 18.

¹⁷⁴ See p. 89 n. 62, p. 92 n. 79, p. 93 nn. 85, 86 above.

knowledge of the activities may be relevant.¹⁷⁵ Similarly, in State responsibility based on complicity through aid, resort to mental fault is unavoidable, and the ILC clearly contemplates use of the concept in its Article 27. If such a concept were not employed, a State might be held responsible for any international wrong carried out by a State to which it has given resources. Such a rule would render aid-giving extremely hazardous. This being said, it must be determined how one can establish the *culpa* of a State, since a State is a non-corporeal entity. This problem has generally been resolved as with corporate bodies in municipal law, namely, by attributing to the entity the *culpa* of its agents.¹⁷⁶

A donor State aware of the violation and of the fact that donated funds facilitate the violation may not desire that the violation occur. It may be indifferent in that regard, or it may desire that the violation should not occur. Any of several possible standards could be established to judge a donor State's attitude towards the wrongful act of the donee State. One possible standard is that the donor State must desire the unlawful result being effected by the donee State. Another is that the donor State is liable where it is aware of the unlawful act, though it does not desire it. Still another is that the donor State is liable where it was not aware of the unlawful act but should have been. These three possible standards will be considered.

1. *Intent standard*

The ILC, as indicated above, requires that the aid be given 'for the commission of an internationally wrongful act'.¹⁷⁷ Neither this formulation nor the accompanying commentary makes clear precisely what state of mind is required.¹⁷⁸ If a donor State desires that a donee State carry out

¹⁷⁵ Brownlie, *op. cit.* above (p. 87 n. 51), at p. 439; P. Reuter, 'Principes de droit international public', *Recueil des Cours*, 103 (1961-II), at pp. 601-2.

¹⁷⁶ Ago, *loc. cit.* above (p. 81 n. 16), at p. 486; Levin, *op. cit.* above (p. 78 n. 5), at pp. 54-62. Soviet authors generally object to attributing the fault of an agent to the State and instead view the fault of the State as a 'social-political act'. See, e.g., Iu. V. Petrovskii, 'O poniatii viny i vmeneniia v mezhdunarodnom prave' ('On the concept of fault and imputability in international law'), *Vestnik Leningradskogo universiteta. Economics. Philosophy. Law*, Issue 1 (5) (1968), p. 134; and P. Kuris, *Mezhdunarodnye pravonarusheniia i otvetstvennost' gosudarstva (International delicts and State responsibility)* (1973), pp. 234-5.

¹⁷⁷ Draft Article 27, *loc. cit.* above (p. 79 n. 11).

¹⁷⁸ Objecting to Draft Article 27's imprecision on the intent issue, the Austrian delegate to the Sixth Committee said (paraphrase): '... article 27 was much too sweeping, and the issue of intention would have to be taken into consideration. As worded, the article meant that the purpose of the act would alone be decisive, but it would also be necessary to ask how and by what means that purpose could be established': GAOR, 33rd Session, Sixth Committee, 37th meeting, at p. 2, para. 3, UN Doc. A/C.6/33/SR.37 (1978). Schutz, commenting on Draft Article 27, predicts that the ILC formulation on intent will give rise to difficulties in application: H. Schutz, 'Die Tätigkeit der International Law Commission im Jahre 1978', *German Yearbook of International Law*, 22 (1979), pp. 414, 427. A formulation that did not make clear precisely what state of mind was meant appeared in a General Assembly resolution on the Middle East that called upon all States 'to put an end to the flow to Israel of any military, economic and financial aid ... aimed at encouraging it to pursue its aggressive policies against the Arab countries and the Palestinian people': GA Res. 39/146 A, 101st plenary meeting, 14 December 1984, adopted 100-16-28.

unlawful acts using resources contributed by the donor State, then the donor State is complicit in those unlawful acts under the ILC formulation. Is it complicit as well where it does not wish the unlawful acts to occur but contributes resources aware that the contribution will facilitate the unlawful acts? This issue was given considerable attention by the ILC.

The 1977 ILC draft (Article 25) required that the aid be given 'in order to enable or help that State [the donee State] to commit an international offence against a third State'.¹⁷⁹ The 1978 draft (Article 27) requires that the aid be 'rendered for the commission of an internationally wrongful act'. Neither draft requires that the donor intend that the violation be committed. One can give aid 'in order to enable or help' even where one does not desire the particular end, but where one knows that it will be used to that end. Similarly, one can give aid 'for the commission' of an act without desiring the act.

In its preliminary discussion of a complicity provision, the ILC focused on the situation of a State that grants another a military base in its territory, where the guest State commits a violation of law from that base against a third State. Commission members appear to have been acting with the incidents of the 1950s in mind, in which the USSR charged other States with permitting military bases in their territory to be used by the guest State for allegedly wrongful purposes.¹⁸⁰

Judge Bedjaoui, the Algerian delegate, speaking to support inclusion of a complicity provision, said that (paraphrase)

he was thinking rather of problems such as that of the granting of military bases by one State to another, either under a mutual defence agreement or simply on a lease. The wrongful acts committed from such bases could, as had recently been seen, give rise to grave tension and complicated situations.

On the issue of the host State's attitude towards the wrongful use, Bedjaoui was not prepared to take a position (paraphrase):

Perhaps the time had not yet come to provide for objective responsibility, direct or indirect, of the territorial State by reason of its acceptance of the risks inherent in the establishment of foreign bases in its territory. That problem should, however, be kept in mind.¹⁸¹

Commission member Ustor, of Hungary, was prepared to take a position on the intent issue and to propose negligence as the minimum level of culpability. Speaking of a State that permits its territory to be used by another to launch aggression, he suggested (paraphrase):

¹⁷⁹ The statement that the offence must be 'against a third State' is incorrect, as the ILC clearly intends that the offence by the donee State may involve violation of any internationally protected right: loc. cit. above, p. 78 n. 7.

¹⁸⁰ See p. 84 n. 31, p. 85 nn. 36-9 above.

¹⁸¹ Summary Records of the 1313th meeting, *Yearbook of the ILC*, 1975, vol. 1, p. 48, para. 10, UN Doc. A/CN.4/SER.A/1975.

. . . that separate provision should be made for the important case of obvious complicity by a State which consented to the use of its territory for the commission of unlawful acts against a third State. There was similar complicity when a State should have known in advance that its territory would be used for an unlawful purpose by the organs of another State admitted to that territory.¹⁸²

Ustor was thus proposing that a State be complicit even when merely negligent in not knowing, when it should have, that a State with bases in its territory planned to launch an aggressive attack from that territory.

The purpose of Article 27 could be defeated if too stringent a *culpa* requirement is imposed. This is so for two reasons. First, it is often difficult to determine the state of mind of a State. A donor State may not advertise its purpose in giving aid, particularly if it is concerned about international repercussions over the use of its aid for a particular wrongful purpose. Additionally, it can be difficult to determine a State's state of mind because the State is represented by a variety of officials who may make conflicting statements about the purpose of the aid.

A second reason for thinking that the purpose of the draft treaty might be defeated by too strict a *culpa* requirement is that in most situations where a donee State commits an international violation, the donor State does not in fact desire the illegal result. The donor State typically acts out of some other motivation. An example is provided by the ILC: Germany's provision of air bases to the US in 1958 to send US airplanes to Lebanon for military intervention there.¹⁸³ The Rapporteur, Judge Ago, considered this situation to fall within the complicity rule, yet it is unlikely that Germany desired US intervention in Lebanon. Germany probably rendered this assistance to the US because of the close relationship between the two States. Its opinion about the situation in Lebanon may not have figured in its decision to permit use of its bases. Similarly, with regard to the USSR's 1956 charge of complicity against Germany and Turkey for the launching of US balloons from their territory,¹⁸⁴ Ago noted that the responsibility of the two States was 'based on passive conduct or toleration on the part of their organs'.¹⁸⁵

This is a typical state of affairs where one State asks another for assistance. The donor State considers the request in the light of its relationship with the requesting State—what benefits it expects from that State in the future, and whether providing the requested aid will help to maintain a relationship that will bring it those benefits. It gains politically from providing the aid, even though the gain has nothing to do with the wrongful act committed by the donee State.

Ago's view on the intent issue should be read in light of these considerations. He writes:

¹⁸² Ibid. at p. 44, para. 13.

¹⁸³ See p. 83 n. 28 above.

¹⁸⁴ See p. 85 nn. 37-9 above.

¹⁸⁵ Summary Records of the 1313th meeting, loc. cit. above (p. 110 n. 181), at p. 42, para. 4.

To supply another State, for example, with raw materials, means of transportation and even arms, where this is not prohibited by a specific international obligation, is not in itself internationally wrongful in any way. What concerns us, however, in the present context, is not to know whether the conduct as such does or does not constitute a breach of an international obligation but whether or not the conduct adopted by the State was intended to enable another State to commit an international offence or to make it easier for it to do so. The very idea of 'complicity' in the internationally wrongful act of another necessarily presupposes intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them. Without this condition, there can be no question of complicity.¹⁸⁶

Ago does not require a desire for the unlawful act on the part of the donor State. By requiring an 'intent to collaborate' he means either a desire for the wrongful act or knowledge of it.¹⁸⁷ In the latter sense Germany intended to collaborate in the sending of US airplanes to Lebanon (even though it may not have desired intervention in Lebanon), as it gave assistance knowing that US intervention in Lebanon would result.

The ILC explained the culpability requirement of Article 27 as follows:

As the article states, the aid or assistance in question must be rendered 'for the commission of an internationally wrongful act', i.e. with the specific object of facilitating the commission of the principal internationally wrongful act in question. Accordingly, it is not sufficient for it to be possible for aid or assistance provided without such intention to be used by the recipient State for unlawful purposes, or for the State providing aid or assistance to be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act.¹⁸⁸

By stating that the aid must be given 'with the specific object of facilitating' the wrongful act, the ILC at first appears to require a purpose on the part of the donor State to bring about the wrongful act of the donee State. But then it states that 'it is not sufficient . . . for the State providing aid or assistance to be aware of the eventual possibility of such use'. The latter statement implies that a donor State is liable if it is aware that it is certain or practically certain that the aid will be put to a wrongful use, even in the absence of a purpose that it be so used. This latter variant is fortified by the final sentence in the language quoted, which indicates that the aid

¹⁸⁶ Loc. cit. above (p. 82 n. 21), at p. 58.

¹⁸⁷ 'Intent' in English usage, and even more clearly in legal usage in Romance languages, can be synonymous with 'purpose' but is also used in a broader sense to include all types of states of mind. It is in the latter sense that Ago uses 'intent' here.

¹⁸⁸ Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at p. 255, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 104, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2). The Uruguay representative to the Sixth Committee proposed for Article 27 the language that aid must be given 'with the intention of permitting or facilitating the commission of an internationally wrongful act': *GAOR*, 33rd Session, Sixth Committee, 43rd meeting, at p. 10, para. 35, UN Doc. A/C.6/33/SR.43 (1978).

must be rendered 'with a view to its use' in a wrongful act. A State providing aid with knowledge of intended wrongful use would be rendering the aid 'with a view to its use' in a wrongful act.¹⁸⁹

The UK delegate to the Sixth Committee feared that Article 27's formulation 'for the commission' might be construed to permit too low a culpability standard, though he did not indicate precisely what he read it to mean. In his view (paraphrase)

The granting State must know that the aid or assistance being given was being used or would be used by the receiving State to commit an internationally wrongful act, and the granting State must intend to facilitate that act by giving the aid or assistance. Although the Commission apparently acknowledged the need for those two key elements, the wording of article 27 did not seem to his delegation to give enough emphasis to them. The phrase 'rendered for the commission of an internationally wrongful act' was too imprecise and could lend itself to varying interpretations in concrete cases. Accordingly his delegation believed that article 27 was too sweeping in its formulation.¹⁹⁰

The UK delegate's remarks suggest that the granting State should have to 'intend' to facilitate the act in the sense of desiring that the act be carried out. Otherwise, it would make no sense to insist on knowledge and intent as two separate elements, as he does. It is thus his view that the ILC intended to require a desire on the part of the granting State to bring about the internationally wrongful act of the recipient State but that its language does not contain that limitation.

While the ILC explanation is not entirely clear, it seems to conclude that a State rendering aid with knowledge of intended unlawful use is liable for complicity. That, as indicated, was the view stated by the Special Rapporteur. That approach is consistent with imposition of liability in the examples given by Ago and by the ILC as a whole as instances of State practice on complicity. Under this approach, for example, Germany would be complicit in the 1958 US intervention in Lebanon since it was not merely aware of an eventual possibility of the unlawful use but knew that such use was practically certain.¹⁹¹

An example from an ongoing aid programme is US aid to Israel and Israel's construction of civilian settlements in occupied Arab territory.¹⁹²

¹⁸⁹ Graefrath and Oeser in their discussion of the culpability standard in Draft Article 27 describe it only as 'intent' and do not distinguish between purpose and knowledge: loc. cit. above (p. 96 n. 104), at pp. 446-8.

¹⁹⁰ GAOR, 33rd Session, Sixth Committee, 37th meeting at p. 7, para. 18, UN Doc. A/C.6/33/SR.37 (1978).

¹⁹¹ We assume for purposes of discussion that the US intervention in Lebanon was unlawful.

¹⁹² Most authorities affirm the illegality of these settlements: *The Colonization of the West Bank Territories by Israel: Hearings Before the Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary*, 95th Congress, 1st Session, p. 116 (1977) (statement of Alfred Atherton, Assistant Secretary of State for the Near East and South Asia); Atherton, Statement before the Subcommittees on International Organizations and Europe and the Middle East of the House Committee on International Relations, *Department of State Bulletin*, 77 (1977), pp. 828-9; *Israeli Settlements in the Occupied Territories: Hearings Before the Subcommittees on International Organizations and on Europe and the Middle East of the Senate Committee on International Relations*,

The US is not merely aware of an eventual possibility that its aid to Israel will facilitate construction of settlements. Given that Israel has declared plans to build settlements and has done so in the past, the US gives the money aware of the practical certainty that Israel will expend funds on settlements. That certainty provided the premiss for an effort by Senator Stevenson to cut US aid to Israel in proportion to the amount it spends on settlements.¹⁹³

A knowledge standard is found in the 1980 Security Council resolution cited above on aid to Israel. The Council called on States 'not to provide Israel with any assistance *to be used* specifically in connection with settlements in the occupied territories'.¹⁹⁴ That language prohibits not only the giving of aid out of a desire that it be used for settlements, but as well the giving of aid that is to be used for settlements. It would certainly encompass the giving of aid with knowledge it would be so used and might go a step further to include the giving of aid without regard for whether it might be so used (recklessness or negligence).

The 1984 Human Rights Commission resolution cited above on the same subject also prohibits aid with knowledge and suggests more strongly than the Security Council resolution that recklessness or negligence might suffice. The HRC resolution calls on States to avoid action or aid 'which *might be used* by Israel in its pursuit of the policies of annexation and colonization'.¹⁹⁵ Thus the resolution includes a State that takes action or gives aid even where it is not aware that the action or aid will be used for the stated wrongful acts, but where it is aware of a possibility that the action or aid might be so used.

In many situations the only facts subject to proof are that aid was given and that the donor State was aware of the wrongful end to which the aid was being put. The donor State's desire with respect to commission of the violation will often not be ascertainable. Yet these situations are the very ones the ILC drafters aim to include.

Proving a donor State's awareness of a donee State's violation is considerably eased where the donor State acknowledges the donee State's violation. Such acknowledgement is not unknown to State practice.¹⁹⁶

95th Congress, 1st Session, appendix, at pp. 167-72 (1978) (letter of H. J. Hansell, Legal Adviser, Department of State), reprinted in *International Legal Materials*, 17 (1978), pp. 777-9.

¹⁹³ See p. 123 nn. 227-8 below.

¹⁹⁴ Loc. cit. above, p. 92 n. 79 (emphasis added).

¹⁹⁵ Loc. cit. above, p. 92 n. 78 (emphasis added). Riphagen appears to construe Article 27 to apply to 'aid or assistance given in the knowledge that it might well be used for the commission of an internationally wrongful act, but without any concern as to whether it would be so used': *GAOR*, 33rd Session, Sixth Committee, 31st meeting, at p. 5, para. 11, UN Doc. A/C.6/33/SR. 31 (1978).

¹⁹⁶ The US has declared unlawful certain acts by Israel, to which it gives considerable aid: permanent expulsion of native West Bank and Gaza Strip residents on political grounds (US Department of State, *Country Reports on Human Rights Practices for 1981*, at p. 1002); imposition of punitive curfews (ibid.); detention of suspects without charge (ibid., at p. 1003); demolition of houses as a form of punishment (ibid., at p. 1004); promotion of settlements for its citizens (*The Colonization of the West Bank Territories . . . and Israeli Settlements . . .*, loc. cit. above, p. 113 n. 192); annexation of East Jerusalem, characterized as unlawful by SC Res. 267, 3 July 1969, *SCOR*, 24th Session, p. 3

2. *Strict liability standard*

Graefrath and Oeser suggest that the culpability standard for complicity should be 'intent' for complicity in an international crime but strict liability for other internationally wrongful acts. They criticize the ILC for making no such distinction in Article 27:

In the ILC text it is not once distinguished whether assistance to the perpetration of a wrongful act like aggression, or to a less serious international violation, is contemplated. Consequently, would it be open to a state that has given arms to an aggressor to assert that this was done without the intent to facilitate the aggression?

Graefrath and Oeser cite UN Charter Article 2, paragraph 5, as an example of a prohibition against aiding an aggressor that does not include an intent requirement:

The undifferentiated treatment of complicity in an international crime in the sense of art. 19 of the draft and of complicity in a treaty violation not only disregards the distinction as defined in art. 19 of the draft between an international crime and a delict but also fails to do justice to such a fundamental and universal obligation as contained in art. 2 (5) of the U.N. Charter. Therein the member states of the U.N. obligate themselves not to give aid to a state against which the U.N. has taken preventive measures or measures involving force. As this example shows, international law now in force does not treat complicity in aggression the same as complicity in violation of a commercial treaty.

To remedy this defect (in their view) of Article 27, Graefrath and Oeser suggest that Article 27

should be amended so that, for example, aid or assistance to an aggressor always gives rise to international responsibility.¹⁹⁷

Graefrath and Oeser's suggested distinction is ill-advised. It is doubtful whether, as they state, such a distinction exists in customary law. They do not analyse the various situations in which one State may give aid to another that commits aggression. They do not raise, for example, the possibility that a State might give military equipment to another, unaware that the latter plans to use it for aggression. Yet their analysis suggests that the aid-giving State should be liable in such a situation.

Such liability would, however, be inappropriate. A State should not be strictly liable for aiding aggression. No State can know to a certainty the intentions of a State to which it is giving or selling arms, or giving economic aid. The recipient State may formulate a plan of aggression only after receiving the aid.

UN Charter Article 2, paragraph 5, contrary to Graefrath and Oeser's

(1969), UN Doc. S/INF/24/Rev. 1 (US voting in favour). For analysis of US liability for complicity by virtue of its aid to Israel, see Quigley, 'United States Complicity in Israel's Violation of Palestinian Rights', *Palestine Yearbook of International Law*, 1 (1984), pp. 95-120.

¹⁹⁷ Graefrath and Oeser, loc. cit. above (p. 96 n. 104), at p. 447.

assertion, does not impose strict liability for aiding aggression. It is true that it contains no culpability standard. It requires States members to 'refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action'. The absence of a culpability standard here does not mean that liability is imposed on a State that gives assistance without awareness that the assistance would be used to oppose the UN or at least awareness that there was a possibility that it might be so used. That much is implied by the wording of Article 2, paragraph 5. The phrase 'giving assistance' to a 'State against which the United Nations is taking . . . action' suggests that the aid-giver is aware of the recipient's intent to use the assistance to oppose the UN action. It is not uncommon for municipal courts to imply a culpability standard in a penal provision in such situations, even though none appears in the provision.¹⁹⁸

Moreover, of the instances of State practice on complicity cited above, in those involving complicity in aggression the State alleging complicity typically suggested that the alleged accomplice State was aware that it was aiding aggression. The USSR's charge that Germany was complicit in US aggression in Lebanon in 1958 implies that the German Government was aware that the US was using air-bases in Germany to send aircraft to Lebanon.¹⁹⁹ Its protest to Italy for permitting US troop carriers to leave for Lebanon from Italian ports carries the same implication. The same is true of its protest to Israel for permitting US and British planes to overfly Israel *en route* to Jordan in connection with British military intervention there.²⁰⁰ One also finds an implication of the necessity of awareness of the aggression in the provision on permitting aggression from one's territory in the 1974 General Assembly Definition of Aggression.²⁰¹

In his comment on Britain's response to the charge that it was complicit in Yemenese aggression by virtue of having supplied it with arms, Lauterpacht said that the British Government recognized a duty to refrain from 'knowingly' supplying arms to assist another State to act unlawfully.²⁰² He does not suggest that the Government view is that there is absolute liability for giving arms to an aggressor. Awareness on the part of the aid-giver is also suggested in the US allegations against the USSR cited above of using other States to commit aggression.²⁰³

In determining the appropriate culpability standard for complicity, it is appropriate to consider the needs of the international order. The purpose should be to make a donor State cautious about the uses to which its resources are put. It should not provide resources to a recipient that it

¹⁹⁸ LaFave and Scott, *Criminal Law* (1972), p. 219.

¹⁹⁹ Loc. cit. above, p. 83 n. 28.

²⁰⁰ Loc. cit. above, p. 84 n. 31.

²⁰¹ Loc. cit. above, p. 83 n. 27.

²⁰² Loc. cit. above, p. 88 n. 55.

²⁰³ Loc. cit. above, p. 88 nn. 58-60.

knows to be using them wrongfully (knowledge or awareness of harm). But it would be counterproductive to impose on a donor State an impossible burden of bearing liability where it has no reason to anticipate the wrongful use of contributed resources.

3. *Domestic law analogies on culpability standard*

Since international practice on the issue is sparse, it is useful to explore domestic law analogies.²⁰⁴ Similar issues arise in domestic civil and penal law as regards supply of resources to one who causes harm to a third party.²⁰⁵ In civil (tort) law one who supplies materials to another who uses them to cause injury is jointly liable with the inflictor of harm. In some instances strict liability is imposed. For example, one who sells liquor to an intoxicated person may be liable without a showing of fault for harm caused by the intoxicated person to a third party.²⁰⁶ For intentional torts, one who supplies resources that another uses to cause harm is liable if the supplier knows that the resources will be used wrongfully.²⁰⁷

The same rule prevails in penal law. Complicity statutes generally apply to a person who supplies resources that facilitate commission of a crime knowing that the resources will be put to wrongful use, even if the supplier does not desire that result. Domestic penal law considers as complicity the act of supplying resources with knowledge of likely unlawful use.

In England the decided cases

are almost uniform to the effect that one who knowingly supplies the means of crime becomes a party to it, and it makes no difference that he had no interest in the crime . . .²⁰⁸

²⁰⁴ International tribunals have used domestic law analogies to provide principles of liability in the law of State responsibility where customary law was unclear. See, e.g., the *Naulilaa* arbitration (1928), where the tribunal decided it could hold the respondent liable for indirect, in addition to direct, damage caused by the respondent's wrongful act: 'Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du Sud de l'Afrique', *Reports of International Arbitral Awards*, vol. 2, pp. 1011, 1032.

²⁰⁵ It is difficult to know whether to analogize from civil or criminal law, as international responsibility contains aspects of both. Delbez writes: 'International responsibility is civil and restitutive responsibility inasmuch as it asks for damages; it is, or more precisely remains, repressive responsibility inasmuch as it is conditioned on an illegal act': L. Delbez, *Les Principes généraux du droit international public* (3rd edn., 1964), p. 359. The distinction proposed by ILC Draft Article 19 (2) between international crimes and other international delicts suggests that some international wrongs are penal in nature and others civil: see p. 130 n. 251 below. For an argument that State practice recognizes a penal character in international responsibility in certain situations (esp. reprisals), see Ago, loc. cit. above (p. 81 n. 16), at pp. 524-31.

²⁰⁶ W. Prosser, *Handbook of the Law of Torts* (4th edn., 1971), p. 538.

²⁰⁷ *Restatement (Second) of Torts* (1979), section 876 (b). Glanville Williams finds that in English law rules on joint tortfeasors are similar to those on accomplices in criminal law: *Joint Tortfeasors and Contributory Negligence* (1951), p. 11. On the rules in English criminal law, see n. 208 below. Continental civil codes are not specific on this point. See, e.g., Italian Civil Code, Article 2005; Federal Code of Obligations (Switzerland), Article 50.

²⁰⁸ G. Williams, *Criminal Law: The General Part* (2nd edn., 1961), p. 379. For illustrative cases, see the following, in all of which complicity was found: *R v. Bainbridge*, [1959] 3 WLR 656 (accused provided cutting equipment used by principals to enter bank, accused knowing only that principals entertained some unknown unlawful purpose); *Pope v. Minton*, [1954] Crim. LR 711 (accused loaned

The same result is reached in the US, unless the principal's offence is minor:

Where the seller or provider of goods or services knows of the unlawful use to be made thereof by the other, this knowledge is in itself sufficient to establish his complicity therein if the offense intended is heinous, but more than knowledge is required for this purpose if the violation is of a minor nature.²⁰⁹

The French Penal Code similarly punishes as an accomplice one who provides resources knowing they will be used illegally:

Those who procure arms, instruments, or any other means that were used for the act, knowing that they were to be so used.²¹⁰

This provision was applied to a person who supplied a gun to another who was planning a robbery, where the supplier knew the gun would be used in the robbery.²¹¹ The same result is reached under the Argentine Penal Code,²¹² which does not describe the required *mens rea* but is construed by a leading publicist as follows:

One assumes the concrete knowledge of the significance of the completed act [of the accomplice] as a fragment in a production process whose total import is also known. This knowledge in the complicity refers, then, to the act of the other participant. Without knowledge of that criminal act by the principal there can be no complicity.

This knowledge must not be generic, but specifically directed to the crime or crimes that the principal proposes to commit. One who, based on this knowledge, *despite this knowledge*, lends a cooperating act to bring it about is an accomplice.²¹³

Likewise in the Soviet Union an 'accessory' includes one who has 'furthered the commission of a crime . . . by providing the means'.²¹⁴ This

automobile to one known by him to have been disqualified from driving); *R v. Bullock*, [1954] 1 WLR 1 (accused loaned automobile knowing it would be used in a burglary).

²⁰⁹ R. Perkins and R. Boyce, *Criminal Law* (3rd edn., 1982), p. 747. In two cases, persons who supplied telephone or telegraph services to persons engaging in illegal gambling using those services were acquitted: *Commonwealth v. Western Union Telegraph Co.*, 112 Ky. 355, 67 SW 59 (1901); *State ex rel. Dooley v. Coleman*, 126 Fla. 203, 170 So. 722 (1936). In these two cases, the defendant was a common carrier legally obliged to provide the service. For instances of conviction, see *Backun v. US*, 112 F 2d 635 (4th Cir. 1940) (complicity in transporting goods across State line, where accused gave another stolen goods knowing they would be transported across State line); *Rosencranz v. US*, 155 F 38 (9th Cir. 1907) (leasing out an apartment, knowing it would be used as a brothel); *Vukich v. US*, 28 F 2d 666 (9th Cir. 1928) (furnishing supplies, knowing recipient would use them to produce contraband liquor); *People v. Hawk and Horowitz*, 16 Cal. Rptr. 370, 365 P 2d 426 (1961) (selling gun, knowing purchaser would commit murder).

²¹⁰ Code Pénal, Article 60, para. 2 (1810). See also R. Merle and A. Vitu, *Traité de droit criminel. Tome I. Problèmes généraux de la science criminelle. Droit pénal général* (3rd edn., 1978), pp. 636-7. The complicity provision in the penal code of Rwanda is identical to Article 60, para. 2, of the French penal code: République Rwandaise, Code Pénal, Décret-Loi No. 21/77, Article 91, para. 2 (1977).

²¹¹ Case of Garici Said, Cour de Cassation, Chambre Criminelle, 17 May 1962, reported in *Recueil Dalloz de doctrine, de jurisprudence et de législation*, 1962, p. 473.

²¹² Argentine Penal Code, Articles 45-6, *American Series of Foreign Penal Codes* (1963), p. 32.

²¹³ S. Soler, *Derecho Penal Argentino* (1951), vol. 2, p. 299. Emphasis in original.

²¹⁴ Fundamentals of Criminal Legislation of the USSR and Union Republics, Article 17, in W. E. Butler, *Collected Legislation of the USSR and Constituent Union Republics: Union of Soviet Socialist Republics* (1981), vol. 4, item VII-8, at p. 9.

provision requires 'intent' on the part of the accomplice. 'Intent' is found where an alleged accomplice knowingly permits the principal's act to occur.²¹⁵ A leading Soviet treatise states:

. . . the intent of the accessory must involve knowledge that his act creates or facilitates an opportunity for the principal to commit the crime. The intent of the accessory can be direct (if he desires the occurrence of the criminal result) or indirect (if he consciously permits its occurrence).²¹⁶

The Polish penal code reaches the same result:

Whoever willing that another person should commit a prohibited act, or *reconciling himself to it*, provides him the means, gives counsel or information or in another similar manner facilitates the commission of that act, shall be liable for aiding.²¹⁷

Both civil and penal law thus provide for liability where the supplier is aware of the prospective wrongful use. The law of State responsibility should go that far. If a State provides resources knowing that it is thereby facilitating commission of an internationally wrongful act, the State should be complicit.

4. *Duty of care standard*

More difficult is the question of whether a State is complicit where it is not aware of the wrongful act but where the facts indicating possible wrongful use are available to it. Suppose that State A supplies half of State B's national budget, and that State B is planning aggression against State C. State A has information that the aggression is under consideration and knows from the size of the aid that that aggression would not be possible without the resources it contributes. Does State A have a duty to make inquiries to State B to ascertain whether State B is in fact planning aggression?

If complicity liability is found in this circumstance, it would not go far beyond the ILC example of the US using FRG bases to send planes to Lebanon in 1958. From the standpoint of ensuring internationally protected rights, to impose liability here would make sense. A State that gives another the potential to cause harm can reasonably be expected to devote attention to possible harm that its donated resources may create.

²¹⁵ *Ugolovnyi kodeks ukrainskoi SSR. Nauchno-prakticheskii kommentarii (Criminal Code of the Ukrainian SSR. Scholarly-Practical Commentary)* (ed. V. I. Zaichuk, 1969), p. 57. The Ukrainian code's provision on complicity is taken verbatim from the Fundamentals of Criminal Legislation of the USSR and Union Republics (loc. cit., previous note). Provisions are similar in the codes of the other fourteen union republics of the USSR.

²¹⁶ A. A. Piontkovskii, P. S. Romashkin, V. M. Chkhikvadze, *Kurs sovetskogo ugodovnogo prava (Course in Soviet Criminal Law)*, vol. 2 (1970), p. 479. The definition of intent to which the authors refer is found in the Fundamentals of Criminal Legislation of the USSR and Union Republics, Article 8, loc. cit. above (p. 118 n. 214), at p. 6.

²¹⁷ Penal Code of the Polish People's Republic (1969), Article 18, para. 2 (trans. W. S. Kenney and T. Sadowski, 1973) (emphasis added).

Suppose that a donee State is planning drastic measures against an ethnic minority within its borders. If a donor State provides half of the donee State's national budget, and if it has information about the plans but does not know their extent, perhaps it has a duty to inquire whether human rights will be violated by the donee State. While the knowledge standard should not be extended too far in this direction, a donor State should be required to ascertain possible planned wrongful use where facts suggesting such are known to it.

(b) *Significance of the Aid in Facilitating a Wrongful Act*

1. *Level of aid*

The first issue is the level of aid a donor State must provide before it becomes liable for the wrongful acts of the donee State. In the situation here posited, namely, that the donor State lacks a desire that the aid be used for a wrongful purpose, it would seem necessary to require a quantitative criterion. It is inappropriate to hold liable a donor-State that provides only minimal aid. A certain level of funding is necessitated by the requirement that the aid facilitate commission of the wrongful act. If the aid is minimal, it may not have appreciably facilitated commission of the act. While it is difficult to define the necessary level, liability seems clear when the donor State provides such substantial aid that virtually any expenditure made by the donee State depends on continued assistance from the donor State. In this situation withdrawal of aid would constitute a substantial detriment to the donee State, and the threat of withdrawal would constitute a substantial incentive to terminate a wrongful act. US aid to Israel provides an example of a high level of assistance that clearly qualifies for potential complicity by means of ongoing aid. The US provides half of Israel's national income, most of it in direct grants²¹⁸ and the remainder in indirect subsidies,²¹⁹ special tariff concessions and income

²¹⁸ T. Stauffer, 'Uncle Sam Keeps the Wolf from Israel's Door', *Christian Science Monitor*, 29 December 1981, at p. 7, col. 1. US Government figures for direct US aid to Israel since 1979 (economic and military combined) indicate an average of \$2.7 billion per year: \$4.8 billion (1979), \$1.8 billion (1980), \$2.2 billion (1981), \$2.2 billion (1982), \$2.5 billion (1983): US Department of State, *Country Reports on Human Rights Practices*, 1981, p. 1011; *ibid.* for 1983, at p. 1291. See also, on figures for 1983, *Report by the Comptroller General of the United States: US Assistance to the State of Israel* (1983), p. 29. A US official calculated that US aid to Israel amounts to about \$670 annually for each person in Israel: Testimony of J. Wheeler, Deputy Administrator, United States Agency for International Development, before the Subcommittee on Europe and the Middle East, US House of Representatives, 26 February 1981, reported in *The Mideast Observer in Washington*, 1 March 1981, at p. 2. For fiscal year 1985 the Administration proposed that all aid to Israel be in the form of grants rather than loans: R. W. Murphy, Assistant Secretary of State for Near Eastern and South Asian Affairs, Statement before the Subcommittee on Foreign Operations of the Appropriations Committee, US House of Representatives, 15 March 1984, *Department of State Bulletin*, May 1984, at pp. 66, 67.

²¹⁹ US military sales to Israel are executed on terms highly favourable to Israel. Weapons are often under-invoiced at discount prices: Stauffer, *loc. cit.* (previous note). In 1983 the Reagan administration decided to grant Israel an exemption from US export laws to permit it to spend up to 15% of the military aid it gets from the US in Israel rather than in the US: *New York Times*, 30 November 1983, at p. 6, col. 6.

tax deductions granted to persons who contribute to Israel.²²⁰ This level of funding has been characterized by one economist as rendering Israel 'all but totally dependent on US economic support, both overt and indirect'.²²¹ Former US Secretary of State Henry Kissinger said that 'Israel is dependent on the United States as no other country is on a friendly power'.²²²

The USSR provides considerable aid to Cuba, though the level is difficult to determine since most of it is in the form of higher-than-market prices in Soviet purchase of Cuban commodities and lower-than-market prices in sale to Cuba of Soviet commodities.²²³ Lower levels of aid, however, qualify for the purpose under discussion. The level suffices if it materially facilitates the allocation of resources by the donee State towards its wrongful act.

2. *Aid as necessary to the wrongful act*

One may also ask whether it is necessary for complicity liability that the illegal conduct could not have been accomplished but for the funding from the donor State.²²⁴ The ILC states that it is sufficient if the aid has 'the effect of making it *materially* easier for the State receiving the aid or assistance in question to commit an internationally wrongful

²²⁰ The US grants tariff concessions on Israeli imports by designating Israel a 'developing country', despite its high per capita income. This has qualified Israel for reduced or zero tariffs. As a result, most of Israel's \$1 billion in annual exports enter the US duty-free. In 1983 the Reagan administration announced it would negotiate with Israel to end duties on all Israeli exports to the US: *New York Times*, 30 November 1983, at p. A1, col. 8. A lawsuit challenging the tax exempt status of major US organizations that collect and give approximately \$1 billion annually to Israel was filed on 6 October 1983: *Khalaf v. Reagan*, USDC, DC, Civil Action No. 83-2963. One claim in that suit was that expenditure of funds by Israel on settlements in occupied territories violates US policy.

²²¹ Stauffer, loc. cit. above (p. 120 n. 218), at p. 7. The Assembly of Heads of State and Government of the Organization of African Unity concluded in a preamble clause of a resolution on the Middle East that US aid to Israel enables Israel to carry out illegal acts: 'Fully conscious of the fact that the massive military, economic and other assistance as well as the political and moral support given to Israel by some powers, the United States of America in particular, enables it to pursue its aggression and encourages it to perpetrate acts of terrorism and illegal occupation of part of the territories in the region, . . .': Resolution on the Situation in the Middle East, Res. A/40/87, 12-15 November 1984, reprinted in United Nations Division for Palestinian Rights, *Bulletin*, vol. 8 (2) (February 1985), p. 4.

²²² H. Kissinger, *Years of Upheaval* (1982), p. 483.

²²³ The US State Department estimates \$2.5 billion in arms 1960-81, 'Cuban Armed Forces and the Soviet Military Presence', Study Paper of the US Department of State, *Department of State Bulletin*, September 1982, at p. 64, and \$3 billion annually in economic aid, *ibid.*, amounting to 'about one-fourth of Cuba's gross national product': 'Cuba's Renewed Support for Violence in Latin America', Research Paper presented by the Department of State to the Subcommittee on Western Hemisphere Affairs, Foreign Relations Committee, US Senate, 14 December 1981, *ibid.*, February 1982, at pp. 68, 70. That figure includes both direct aid and higher-than-market prices paid for Cuban sugar and lower-than-market prices in sale to Cuba of oil: *ibid.* The State Department did not explain how it arrived at its figures.

²²⁴ Israel, for example, could probably not carry out certain of the wrongful acts mentioned above without US funding. It could not get from any other source the funds it receives from the US. In 1980 in US Senate discussion of a proposal to reduce US funds to Israel in the amount Israel spends on its settlements in the West Bank and Gaza Strip, Senator Robert Packwood noted that Israel could not get the funds elsewhere: 'we are the last country that has the wherewithal and the willingness to supply her': *Congressional Record*, 126 (1980), p. 15057.

act'.²²⁵ This standard does not require that the wrongful act would not have been possible without the aid. It suffices if the aid made it materially easier for the donee State to carry out the wrongful act.

The ILC approach here seems sound. It would be inappropriate to require a finding that the principal would have been absolutely unable to carry out the wrongful act without the aid. A State that gives aid to another 'for the commission' of a wrongful act should be responsible, even if the donee State could have carried out the wrongful act without the aid. This approach is consistent with that in domestic penal law, which does not require that the act could not have been carried out but for the accomplice's aid. It is sufficient that the aid increased the possibility that the illegal conduct would be accomplished.²²⁶ Liability is not negated where the principal could have completed the crime without the assistance of the alleged accomplice, or where the principal could have obtained the assistance from someone else. This rule is appropriate for the law of State responsibility.

3. *Identity of resources used for the wrongful act*

Another issue is whether it is necessary that the contributed resources be used for the donee State's wrongful act, or whether it suffices if the donee State uses other resources available to it. This issue could arise with aid in the form of monetary grants, where the donee uses for a wrongful act moneys other than those contributed. It could also arise with aid in the form of military equipment, where a donee uses munitions to carry out aggression, and where the donor has contributed the same type of munitions, but where those used are not those contributed.

This issue has not been specifically addressed by the ILC or its Rapporteur in their commentaries. It is submitted that complicity liability should be found in such situations. Otherwise, a donee State can take resources that make it possible to carry out a wrongful act but protect the donor State from liability by using other weapons or other funds available to it. In such situations, however, the requirement of the ILC that the aid materially assist the violation would be met. If, for example, a donee State carries out an internationally wrongful act using resources contributed for public health, the aid has none the less materially facilitated the wrongful act.

This issue was raised in a US Senate discussion in 1980 over a proposal to reduce aid to Israel by the amount it spends on civilian settlements in occupied Arab territory. The US did not give Israel funds expressly for use in the West Bank or Gaza Strip. In fact, it was stipulated that Israel

²²⁵ Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at p. 254, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 104, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2). Emphasis in original.

²²⁶ *State ex rel. Attorney-General v. Tally*, 102 Ala. 25, 15 So. 722 (1894); Piontkovskii, *op. cit.* above (p. 119 n. 216), at p. 458.

was not to use US funds in those areas. Opposing the proposal, Senator Robert Dole argued:

No U.S. funds at all are used directly or indirectly for the establishment of settlements in the occupied territory. Every year in each annual assistance agreement, it is stated that no American economic assistance may be used outside the pre-1967 borders. Israel has scrupulously abided by the covenants.²²⁷

Senator Adlai Stevenson, proponent of the proposal, replied:

An agreement between the United States and Israel provides that assistance by the United States must be used in the area which constituted pre-1967 Israel, that is not in the Israeli occupied territories. I do not know if that agreement has been violated. . . . As it is, economic support funds made available to Israel free Israeli resources for use elsewhere, including the West Bank. There is no way to isolate or insulate this aid so that it does not provide indirect aid to Israel in the furtherance of its settlements policy.²²⁸

Stevenson's position found support in a 1983 report of the US Comptroller General on US assistance to Israel:

. . . the United States is faced with the possibility of indirectly supporting Israeli actions, with which it does not necessarily agree, through the bolstering of Israeli budget needs. Furthermore, the Israeli Government's liberal subsidies granted to its people for settling on the West Bank must be absorbed at the cost of other needs.²²⁹

The fact that resources used for the wrongful act are not those contributed does not negate complicity liability. The aid can in this situation none the less materially facilitate the wrongful act.

4. *Benefit to donor State from the wrongful act*

It may also be inquired whether it is necessary for complicity that the donor State, even if it does not desire the wrongful act of the donee State, must none the less perceive itself as deriving benefit from the aid.

Donor States generally derive benefit from their aid programmes, but this is not necessary for complicity liability. Regardless of a donor State's motive, it is liable if it provides aid knowing that it will be used wrongfully, so long as the aid materially facilitates the wrongful act.²³⁰

(c) *Efforts by Donor State to Avert Wrongful Acts*

1. *Objection by donor State against the wrongful act*

May a donor State escape responsibility by objecting to the illegal conduct of the donee State or by urging the donee State to terminate it? If the donee State is not persuaded by the pressure and continues the

²²⁷ *Congressional Record*, 126 (1980), p. 15058.

²²⁸ *Ibid.* at p. 15048.

²²⁹ *Report by the Comptroller General* (above, p. 120 n. 218), at p. 28.

²³⁰ Draft Article 27, Report of the International Law Commission, loc. cit. above (p. 79 n. 8), at p. 196.

violations, is the donor State liable? The ILC's Draft Article 27 would seem to render a donor State liable for complicity in such a situation, despite its objection. All that Draft Article 27 requires is that the donor provide aid for commission of the wrongful act, and that the wrongful act be carried out. These elements are present despite an objection by the donor State.

The gist of the harm contemplated by complicity is the injury to the party against whom the donee State's act is directed. From the standpoint of the injured party, it matters little that the donor State objected to the donee State—for example, that the US has characterized as illegal Israel's funding of civilian settlements in occupied Arab territory.²³¹ As indicated, it was proposed in the US Senate that aid be reduced by the amount spent annually by Israel on settlements.²³² Even such a measure would not negate liability, however. It would not deprive the donee State of resources that would have materially aided in promotion of the settlements.

2. *Stipulation by donor State against wrongful use*

May a donor State avoid complicity liability by stipulating that its aid should not be used for a wrongful purpose? In the provision of money aid, such a stipulation does not prevent the donee State from committing other resources to the wrongful act, as US aid to Israel shows. In certain contexts, however, such a stipulation might relieve the donor State of liability. If a donor State supplies equipment that could be used to perpetrate torture but stipulates that it should not be so used, or if it supplies weapons whose offensive use violates the laws of warfare but stipulates that they should not be used before an enemy employs similar weapons against the donee State, is it then liable for complicity if the equipment or weapons are used unlawfully?

Thailand suggested in the General Assembly's Sixth Committee that such a stipulation would exonerate the donor State only if it included an enforcement mechanism.²³³ The Thailand representative did not specify what kind of mechanism, but presumably it would involve termination of future supply. This position is sound. A donor State should not be liable for complicity if, stipulating against wrongful use, it supplies items that are in fact put to a wrongful use but retracts or ends the supply upon learning of the wrongful use. In this situation it has given the aid not knowing that it would be used for the wrongful purpose. A stipulation against wrongful use, without more, would not, however, suffice to negate liability. If a donor State supplies, for example, electrical apparatus and stipulates that it should not be used to administer torture, it should be liable for complicity if it learns that the apparatus is being used for torture

²³¹ See p. 113 n. 192 and p. 114 n. 196 above.

²³² *Congressional Record*, 126 (1980), p. 15060.

²³³ *GAOR*, 33rd Session, Sixth Committee, 38th meeting, at p. 5, para. 14, UN Doc. A/C.6/33/SR.38 (1978).

yet takes no action to prevent continued wrongful use, when such action is available to it.

V. CONSEQUENCES OF A COMPLICITY VIOLATION

(a) *Remedies Available to Injured Party*

The ILC has not included in its articles on consequences of breach a provision relating to the consequences of complicity. It will thus be left to tribunals to formulate rules on the consequences of complicity, using customary law and the ILC's articles on liability. Customary law requires an offending State to

restore the situation exactly as it was before being shattered by the illegal action, or, if there is no longer a possibility of this being done, to repair the damage by making compensation in some other manner.²³⁴

An article submitted to the ILC by the Special Rapporteur similarly calls for restitution of the *status quo ante* or, if that is not possible, compensation. It requires an offending State to 'discontinue the act', 'prevent continuing effects of such act', to 'apply such remedies as are provided for in, or admitted under, its internal law', and to 're-establish the situation as it existed before the act', but 'to the extent that it is materially impossible' to do those things, the State shall pay compensation 'corresponding to the value which a re-establishment of the situation as it existed before the breach would bear'.²³⁵

The ILC also contemplates the possibility of punitive consequences of a breach of the law of State responsibility. State practice provides examples of punitive consequences.²³⁶ Application to a complicit State of punitive consequences will be considered below. First, the traditional remedy of reparation must be addressed as it applies to a complicit State.

(b) *Reparation as a Remedy*

A donor State, to make reparation, may be requested to restore the *status quo ante* or to make monetary compensation, or both.

1. *Restitution*

To restore the *status quo ante*, a donor State can be ordered to terminate shipment of the material aid, at least if it is still being used wrongfully by the principal State or if there is a likelihood that it will be so used.²³⁷ This

²³⁴ Eagleton, *op. cit.* above (p. 80 n. 13), at p. 182. See, for a similar formulation, *Chorzów Factory (Germany v. Poland)*, PCIJ, Series A, No. 13, at p. 47 (judgment of 13 September 1928), reprinted in Hudson, *World Court Reports*, 1 (1922-6), pp. 677-8. For a contrary view—that money damages is the normal remedy—see C. Rousseau, *Droit international public* (1953), p. 383.

²³⁵ Report of the ILC to the General Assembly, GAOR, 39th Session, Supplement 10, at p. 238, Article 6, para. 2, UN Doc. A/39/10 (1984).

²³⁶ Report of the ILC to the General Assembly, GAOR, 31st Session, Supplement 10, at pp. 236-7, UN Doc. A/31/10 (1976), reprinted in *Yearbook of the ILC*, 1976, vol. 2, p. 100, UN Doc. A/CN.4/SER.4/1976/Add. 1 (pt. 2).

²³⁷ The General Assembly, concluding that Israel was using military equipment for aggressive

remedy is feasible where the material aid consists of provision of resources, though it would not be feasible in such a situation as permitting one's territory to be used to perpetrate wrongful acts. In the latter situation a tribunal presumably would order cessation of the permission for the wrongful acts.

With provision of resources, the issue is complex where the resources supplied are monetary in nature. If the principal State has used money supplied by the aider State to commit a wrongful act, and if the act is continuing, termination of the money aid might be a realistic remedy if all the money aid given is being used for the wrongful act.²³⁸ But if that money is a part of a larger sum of money aid, the question would arise whether a tribunal should order cessation of the entire sum, or only of the amount used for the wrongful act. The danger in the latter approach is that the principal State might divert other contributed moneys to the wrongful act. The danger in the former approach is that a tribunal would be ordering cessation of lawful aid.

The donor State should be ordered not only to ensure that future contributed resources are not used wrongfully but also to minimize the harmful effects of resources already contributed. Thus, where the donee State has used contributed resources to manufacture chemical weapons, the donor State could be ordered to assist victims of the use of the weapons, for example by providing medical treatment. A donor State might also be called upon to use its influence with the principal State to terminate the violation, where the violation is continuing.²³⁹

More delicate is the issue of whether a donor State could be ordered to take coercive measures to ensure that the principal State cease its violation or remedy the effects of past violations. Should a tribunal, for example, order a donor State that has provided chemicals used to make chemical weapons to terminate economic aid, or even commercial or diplomatic relations, to bring pressure on a donee State to stop using these weapons? The further one moves, in ordering remedial acts by a donor State, from the immediate assistance rendered, the more difficult will it be to secure compliance, and the more serious will be the infringement of the donor State's sovereignty. For these reasons, such drastic remedies as termination of commercial or diplomatic relations would ordinarily be inappropriate.²⁴⁰

ends, called on States 'to refrain from supplying Israel with any new weapons and related equipment and to suspend any military assistance that Israel receives from them': GA Res. 39/146 B, 101st plenary meeting, 14 December 1984 (adopted 88-22-32).

²³⁸ The General Assembly has called on States 'to suspend economic, financial and technological assistance to and co-operation with Israel': *ibid.*

²³⁹ A number of General Assembly resolutions have called on States to use their influence to encourage a State to change a policy: Levin, *op. cit.* above (p. 78 n. 5), at pp. 142-3; GA Res. 1699 (XVI) and 1807 (XVII) (Portugal on its African colonies); GA Res. 1889 (XVIII) (UK on its rule in Southern Rhodesia). Votes on these resolutions were, respectively, 90-3-2, 82-7-13 and 73-2-19.

²⁴⁰ Levin, *op. cit.* above (p. 78 n. 5), at pp. 145-8, gives examples of international organizations recommending breach of economic and diplomatic relations.

2. *Monetary compensation*

If it is determined that monetary compensation is the appropriate remedy, the liability of the accessory and the principal, by analogy with domestic law, might be joint and several, that is, each would be liable for the entire amount. Thus far on this point 'the practice of states is almost completely non-existent', from which Brownlie concludes that the practice 'strongly suggests by its silence the absence of joint and several liability in delict in state relations'. Some State practice is provided by claims against Axis States following the Second World War:

Practice in the matter of reparation payments for illegal invasion and occupation rests on the assumption that Axis countries were liable on the basis of individual causal contribution to damage and loss, unaffected by the existence of co-belligerency.²⁴¹

This comment relates, however, only to a situation in which it is possible to identify the harm caused by the individual States. But if, in a case of co-principals, it is not possible to identify the harm caused by each of the co-principals, or in the case of an aider and a principal, where there is no separate harm caused by each, it would seem that joint and several liability would be appropriate.

This question was raised without being answered in the US Court of Claims in *Anglo-Chinese Shipping Co. v. United States*.²⁴² A vessel of a British shipping company was commandeered in 1946 by the Supreme Allied Commander in Japan, a US official, for use in the laying of submarine cables in Japan. The Commander returned the vessel to the company in 1950, whereupon the company sued in the US Court of Claims for the US Government's use of the vessel for the four years from 1946 to 1950. The US Government defended by arguing that since the Supreme Allied Commander had acted on behalf of all four occupying powers (UK, USSR, China and the US), the company must sue all four. It argued that it was not liable alone for an act that must be attributed to all four.

The Court of Claims decided that the act of commandeering the vessel should be attributed not to the US or the Allies but rather to Japan. It thus avoided the need to resolve the issue raised by the company's claim and the US defence. In an *obiter dictum*, however, it said on the joint liability issue:

When private parties or private corporations or municipal corporations enter into a joint venture, the parties are jointly and severally liable for the acts of their agent, and their individual property may be levied upon to satisfy any judgment, at least after the assets of the joint venture have been exhausted. Whether this rule should be applied to sovereign nations engaged in a joint enterprise has never been decided, and we do not now decide it, because we do not think any of the Allied Powers are liable, for the reasons to be stated.²⁴³

²⁴¹ Brownlie, *op. cit.* above (p. 79 n. 11), at p. 189.

²⁴² 127 F Supp. 553 (1955). Also reported in 22 ILR 982 (1955).

²⁴³ 127 F Supp. 556-7.

It then explained that Japan alone was liable, rather than the US or its allies.²⁴⁴

In such a situation, it would seem appropriate for joint and several liability to attach. Where the harm caused by co-principals cannot be identified, the only two possible resolutions are that each is responsible for the entire harm, or that each is responsible only for a portion, which could be established as equal portions or set in some other fashion, perhaps taking into account the ability to pay of the States involved. Joint and several liability would seem appropriate, since the plaintiff cannot prove what portion of the harm was caused by which of the co-principals.

Such is the result reached, at least in principle, by the British-US Arbitral Tribunal in the *Zafiro* case.²⁴⁵ There a British-owned company in Manila was looted during the Spanish-American war by Chinese crew members of the *Zafiro*, a US public vessel. The Tribunal determined that the US should be responsible for the acts of the crew members but found that those crew members had not caused all the damage:

We think it is clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.²⁴⁶

The Tribunal obscured this statement of principle, however, by deciding that 'in view . . . of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed'.²⁴⁷ Since the arbitration was conducted twenty-seven years after the event, the interest was substantial. Thus, the Tribunal did not require the US to compensate for the total amount of the harm caused.

In a situation of co-principals, one can oppose the notion of joint and several liability on a State sovereignty analysis—that a State should be responsible only for its own acts. In the situation of an aider State and a principal State, however, the two combine to cause precisely the same harm. It is difficult to argue that the aider should not be responsible for the whole of the harm inflicted by the principal. It has facilitated that very harm. In the interest of compensating the injured party, liability should be joint and several. If either the aider State or the principal State pays full compensation to the injured party, then it should have an action against the other for a contribution.

In some situations, however, it might be appropriate for the liability of the complicit State to differ from that of the principal State. The ILC's

²⁴⁴ 127 F Supp. 557.

²⁴⁶ Ibid. at pp. 164-5.

²⁴⁵ *Reports of International Arbitral Awards*, vol. 6, p. 160 (1925).

²⁴⁷ Ibid. at p. 165.

theory, it will be recalled, is that complicity is a delict separate from that of the principal wrongful act. It takes the view that in some situations the act of the complicit State is not as serious as that of the principal State. It cites as an example the act of a State that aids aggression or genocide.²⁴⁸ The ILC posits that the act of the complicit State may be less serious than that of the State committing aggression or genocide. If a tribunal were to order reparation to a people that had been subjected to a regime of *apartheid*, would it consider the liability of the complicit State and the principal State to be joint and several? Let us suppose that the act of the complicit State had been to give monetary grants to a political party upholding a policy of *apartheid* in the State in question.

The ILC analysis suggests a negative answer. Presumably a tribunal would assess damages against the complicit State at a level lower than those it might assess against the principal State. Conversely, there might be situations in which higher damages should be assessed against a complicit State than against a principal State. If a developed State provides extensive monetary and military assistance to a developing State in order to facilitate the developing State's aggression against a neighbouring State, the developed State might be considered more culpable and therefore would merit a higher award of damages against it. The path to assessing higher or lower damages against a complicit State is left open by the concept that the act of a complicit State is a wrong separate from that of the principal State.

The ILC appears to follow this view—that responsibility of a State should correspond to the degree of its fault. It thus appears to reject joint and several liability, though no article yet drafted bears directly on the issue. The question of the consequences of complicity was raised in a report to the ILC by Special Rapporteur William Riphagen (who replaced Ago in 1980). Both the report and the ILC discussion of it proceeded from the principle that the responsibility of a complicit State should be in proportion to the seriousness of its wrongful act.²⁴⁹

(c) *Remedies involving Punitive Measures*

The ILC's distinction between crimes and delicts potentially complicates the type of remedy that might follow a finding of complicity. For delicts the principal State must make restitution or, if that is not possible,

²⁴⁸ Report of the ILC to the General Assembly, *GAOR*, 33rd Session, Supplement 10, at p. 254, UN Doc. A/33/10 (1978), reprinted in *Yearbook of the ILC*, 1978, vol. 2, p. 103, UN Doc. A/CN.4/SER.A/1978/Add. 1 (pt. 2).

²⁴⁹ Report of the ILC to the General Assembly, *GAOR*, 35th Session, Supplement 10, at pp. 133–5, UN Doc. A/35/10 (1980), reprinted in *Yearbook of the ILC*, 1980, vol. 2, pp. 62–3, UN Doc. A/CN.4/SER.A/Add. 1 (pt. 2); Summary Records of the 1666th meeting, *Yearbook of the ILC*, 1981, vol. 1, p. 127, para. 20 (statement of Special Rapporteur Riphagen), UN Doc. A/CN.4/SER.A/1981; Summary Records of the 1668th meeting, *ibid.*, p. 133, para. 17 (statement of Sucharitkul), UN Doc. A/CN.4/SER.A/1981. Ushakov disputes use of proportionality, suggesting instead emphasis on the state of mind underlying the act: Summary Records of the 1668th meeting, *ibid.*, p. 134, paras. 25–6 (statement of Ushakov), UN Doc. A/CN.4/SER.A/1981.

provide monetary compensation.²⁵⁰ But for commission of a crime, a principal State may be subjected to other consequences, including military action against it.²⁵¹ For commission of a crime a State may be called to account not only by the injured party but by any State, on the theory that a crime is a breach of world order, not merely an infliction of harm on the injured party.²⁵²

This raises the question whether the aider State, along with the principal State, could be subjected to punitive sanctions. And could sanctions against the aider State be sought only by the injured party, or by any State? If a State supplies tanks to another State that commits aggression, the aider State should ordinarily be subject to reparational consequences only. But if the aider State provided the principal State with a particularly large quantity of tanks and if, in addition, it incited the principal State to commit the aggression, then the aider State might be considered equally at fault with the principal State, or perhaps even more at fault. But here the 'aider' State would probably be found to be a co-principal.

VI. CONCLUSION

The scope of complicity liability where one State gives aid to another has yet to be clearly defined in State practice. But the significance of complicity liability is likely to grow as the increasing ties between States result in more provision of aid. Complicity is particularly important in an age when certain States have substantially greater resources than others, and when powerful States seek to influence events abroad. In such circumstances complicity assumes great importance for protecting individuals, peoples and weaker States.

In concluding his 1928 treatise on State responsibility, Clyde Eagleton called for expansion of the law of State responsibility to keep pace with the growing interdependence of nations:

The necessities of human and international intercourse account for the establishment of every existing rule of international law; and the pressure of interdependence, now greater than ever, will, without question, result in a further expansion of the principle of responsibility. Here, again, as has already been proved irresistibly true within the state, the social interest of the group must inevitably dominate the interests of individual members. States may as well recognize the existence of this force by common action to secure a legal basis for its use; for otherwise responsibility will be enforced by physical might, according to the desires of the state which is capable of imposing those desires upon less fortunate members of the society of nations.²⁵³

²⁵⁰ See p. 125 n. 235 above.

²⁵¹ Report of the ILC to the General Assembly, *GAOR*, 31st Session, Supplement 10, at pp. 267-81, UN Doc. A/31/10, reprinted in *Yearbook of the ILC*, 1976, vol. 2, pp. 111-17, UN Doc. A/CN.4/SER.4/1976/Add. 1 (pt. 2). This position has been urged most strongly by Soviet writers: see, e.g., *Kurs mezhdunarodnogo prava (Course in International Law)*, vol. 5 (1969), p. 412.

²⁵² Report of the ILC to the General Assembly, *GAOR*, 31st Session, Supplement 10, at p. 235, UN Doc. A/31/10, reprinted in *Yearbook of the ILC*, 1976, vol. 2, p. 99, UN Doc. A/CN.4/SER.4/1976/Add. 1 (pt. 2).

²⁵³ Eagleton, *op. cit.* above (p. 80 n. 13), at p. 228.

Eagleton's call for expansion of principles of State responsibility rings as true today as it did in 1928. If today the 'less fortunate members of the society of nations' are to be protected from 'physical might', they must be protected not only against the acts of a State that does them harm but as well against aid given to the offending State by a third State. In many situations they may require protection from the State providing aid more than from the State directly causing the harm.

Since Eagleton wrote his treatise, the law of State responsibility has come to protect peoples and even individual persons, in addition to States. These categories of victims are particularly vulnerable to harm from aid-providing States. Complicity liability has become established in the practice of States. It should be developed and strengthened to provide much-needed protection.

THE ROLE OF CONSENT IN THE TERMINATION OF TREATIES*

By RICHARD PLENDER¹

I. INTRODUCTION

IN recent years there appears to have been a revival of interest in the law governing the termination of treaties.² This may be attributable in part to the occurrence of several international disputes, commanding widespread attention, about the continuation or extinction of specific treaty obligations. For example, the State Department of the United States sought to justify its augmentation of military personnel and equipment in South Vietnam beyond the level permitted in the cease-fire agreement of 1954 by reference to the 'international law principle that a material breach by one party entitles the other . . . to withhold compliance with an equivalent, corresponding or related provision . . .'.³ In part, the revival of interest may be attributable to the prominence given to the subject in the Vienna Convention on the Law of Treaties⁴ and (to a lesser extent) in the Vienna Conventions on Succession of States in respect of Treaties⁵ and on Treaties between States and International Organizations.⁶ Indeed, the Vienna Convention of 1969 devotes more than a third of its articles to this

* © Dr Richard Plender, 1987.

¹ MA, LL B, LL M, Ph.D., JSD; Reader, King's College, London.

² The subject was never neglected. Among the earlier works on the subject are Lord McNair's Hague lectures, 'La Terminaison et la dissolution des traités', *Recueil des cours*, 22 (1928-II), p. 459; C. Fairman, 'Implied Resolutive Conditions in Treaties', *American Journal of International Law*, 29 (1935), p. 219; J. W. Garner and V. Jobst III, 'Unilateral Denunciation of Treaties', *ibid.*, p. 569, and Harvard Research Draft on the Law of Treaties, *ibid.*, Supplement, p. 657, Articles 27-8 and 33-5 with comments, pp. 1077-1126 and 1161-1204. See also E. Giraud, 'Modification et terminaison des traités collectifs', *Annuaire de l'Institut de Droit International*, 49 (1961), p. 5. In recent years, however, the literature has become abundant. Among the general works on the subject are H. Briggs, 'Procedures for Establishing the Invalidity or Termination of Treaties', *American Journal of International Law*, 61 (1967), p. 976, and Q. Wright, 'The Termination and Suspension of Treaties', *ibid.*, p. 1000; B. Simma, 'Termination and Suspension of Treaties', *German Yearbook of International Law*, 21 (1978), p. 74; F. Capotorti, 'L'Extinction et la suspension des traités', *Recueil des cours*, 134 (1971-III), p. 419; S. Nahlik, 'The Grounds of Invalidity and Termination of Treaties', *American Journal of International Law*, 65 (1971), p. 736; T. O. Elias, 'Problems Concerning the Validity of Treaties: Introduction: Grounds of Validity of a Treaty', *Recueil des cours*, 134 (1971-III), p. 333; D. Schaffer, 'Law of Treaty Termination as applied to the US De-recognition of the Republic of China', *Harvard International Law Journal*, 19 (1978), p. 931; and M. Akehurst, 'Withdrawal from International Organizations', *Current Legal Problems*, 32 (1979), p. 143. Literature appropriate to particular aspects of the subject is identified at the corresponding passage of the text, below.

³ Department of State, Office of the Legal Adviser, *The Legality of United States Participation in Defence of Vietnam* (4 March 1966), reprinted in *American Journal of International Law*, 60 (1966), p. 565.

⁴ 23 May 1969, *ibid.* 63 (1969), p. 875, hereafter called 'the Vienna Convention of 1969'.

⁵ 23 August 1978, *ibid.* 72 (1978), p. 971; *International Legal Materials*, 17 (1978), p. 1488.

⁶ 20 March 1986, UN Doc. A/CONF. 129/15.

subject, or more than twice as much space as is devoted to the observance, application and interpretation of treaties.⁷ For present purposes, however, the interest of the subject lies in its theoretical significance.

Every obligation imposed by a treaty is qualified by the conditions governing its termination. This is so not only in the obvious sense⁸ but also in the sense that the law governing the termination of treaties sheds light on the quality of the obligations imposed thereby. An obligation voluntarily assumed may be considered consensual so long as it is maintained in force by consent—which implies that it is terminable by consent, expressed or implied. Nevertheless, certain of the well-established grounds for terminating treaties are commonly explained without reference to the parties' wishes. The Vienna Convention of 1969 deals with termination by consent in Article 54, and devotes separate articles to the denunciation of treaties,⁹ their termination by later agreements¹⁰ and breach.¹¹ That Convention does not deal expressly with desuetude; and that form of termination is sometimes explained without reference to any consensual element.¹²

In the following pages an account will be given of the law governing the termination of treaties on the ground of consent, as that term is used in Article 54 of the Vienna Convention of 1969; on grounds of desuetude; in the event of unilateral denunciation; by the conclusion of later treaties; and by breach. In each of these cases the consensual element in the extinction of the treaty obligation will be explored. Save exceptionally, the suspension of treaties, the withdrawal of parties and the termination of treaties by reason of acts or events beyond the parties' control, including supervening impossibility,¹³ the fundamental change of circumstances¹⁴ and the emergence of new peremptory norms,¹⁵ will be left aside for these purposes.

⁷ It must be acknowledged, however, that this is an optical illusion, for two reasons. The first is the reason given by Nahlik, loc. cit. above (p. 133 n. 2), at p. 738, who points out that if all the general provisions are set aside there are but nineteen articles, instead of thirty, to deal with the ways in which the binding force of treaties can be limited. The second is the reason implied by Sir Ian Sinclair in *The Vienna Convention on the Law of Treaties* (2nd edn., 1984), p. 162: the International Law Commission chose to consider as aspects of the invalidity of treaties matters considered as aspects of essential validity by Lord McNair (*The Law of Treaties* (1961), pp. 206–36), Sir Gerald Fitzmaurice (Third Report on the Law of Treaties, UN Doc. A/CN.4/115 of 18 March 1958) and Sir Humphrey Waldock (Second Report on the Law of Treaties, UN Doc. A/CN.4/156 of 20 March 1963).

⁸ Thus Article 26 of the Vienna Convention of 1969 provides: 'Every treaty *in force* is binding on the parties to it and must be performed by them in good faith' (emphasis added). The continuing validity of a treaty is among the first questions to be addressed by anyone who seeks to invoke it.

⁹ Article 56.

¹⁰ Article 59.

¹¹ Article 60.

¹² See I. Detter, *Essays on the Law of Treaties* (1976), at p. 93, and B. Broms and others, 'Effects of Armed Conflicts on Treaties', *Annuaire de l'Institut de Droit International*, 59 (1981), pp. 175 and 201.

¹³ Vienna Convention of 1969, Article 61.

¹⁴ Article 62. See O. Lissitzyn, 'Treaties and Changed Circumstances', *American Journal of International Law*, 61 (1967), p. 895; G. Haraszti, 'Treaties and Fundamental Change of Circumstances', *Recueil des cours*, 146 (1975–III), p. 1.

¹⁵ Article 64. See H. Li, 'Jus Cogens and International Law', *Selected Articles from the Chinese Yearbook of International Law* (Beijing, 1982), p. 41; N. Ronzitti, 'Disciplina dello jus cogens nella Convenzione di Vienna sul diritto dei trattati', *Comunicazione e Studi*, 15 (1978), p. 241; M. Magollona,

II. EXPIRY CLAUSES

Let us begin with the simplest case. The termination of a treaty may be governed expressly, in an expiry clause.¹⁶ According to Article 54 (a) of the Vienna Convention of 1969, 'The termination of a treaty may take place: (a) in conformity with the provisions of the treaty . . . '.

(a) *Variety of Expiry Clauses*

The diversity of language found in expiry clauses is impressive.¹⁷ Where the treaty is for a fixed term, the draftsman may choose to specify the expiry date (as in the Triple Alliance)¹⁸ or to express the period of validity in terms of years measured from the date of entry into force (as in the European Coal and Steel Community Treaty).¹⁹ Frequently treaties contain clauses providing for the extinction of the whole or parts of the instrument on the occurrence of a future uncertain event, such as the termination of a related treaty.²⁰ Modern treaties are commonly expressed to remain in force for a specified period and to be renewed automatically for successive shorter periods thereafter, until any party gives notice of termination.²¹ Others are expressed to remain in force for an indefinite period, subject to the right of either party to denounce the treaty after giving a specified period of notice.²² Yet others are silent on the question of their periods of validity but contain denunciation clauses.²³ Some multi-lateral treaties are stated to remain in force until terminated by unanimous agreement.²⁴ Commercial debt agreements to which the United Kingdom

'Concept of *Jus Cogens* in the Vienna Convention on the Law of Treaties', *Philippine Law Journal*, 51 (1976), p. 521; V. Nagesurar Rao, '*Jus Cogens* and the Vienna Convention on the Law of Treaties', *Indian Journal of International Law*, 14 (1974), p. 302.

¹⁶ By 'expiry clause' is meant a clause fixing the term for which the treaty is to remain in force (or the date when it is to cease to be in force). See E. Satow, *Guide to Diplomatic Practice* (4th edn., 1957), p. 293.

¹⁷ Few commentators have failed to dilate upon the point. See, in particular, *Yearbook of the International Law Commission*, 1966, vol. 2, p. 249; Capotorti, loc. cit. above (p. 133 n. 2), at p. 477; McNair, loc. cit. above (p. 133 n. 2), at p. 465; Sinclair, op. cit. above (p. 134 n. 7), at p. 182; T. O. Elias, *The Modern Law of Treaties* (1974), at p. 101.

¹⁸ Treaty of Vienna, 20 May 1882, extended by Treaty of Berlin, 20 February 1887, 'until 30 May 1982'; see P. Albin, *Les Grands traités politiques* (1911), p. 61.

¹⁹ Paris, 18 April 1951, *American Journal of International Law*, 46 (1952), Supplement, p. 107, Article 97.

²⁰ e.g. Franco-Russian Agreement of 19 August 1892, stated to have the same period of validity as the Triple Alliance (n. 18, above).

²¹ See, e.g., UK-Chinese Protection of Investments Agreement, 15 May 1986, Cmnd. 9821, Article 12; UK-Cameroon Protection of Investments Agreement, 4 June 1982, Cmnd. 9592, Article 13.

²² See, e.g., UK-Iceland Social Security Convention, 25 August 1983, Cmnd. 9780, Article 33; UK-Ireland Reciprocal Holding of Oil Stocks Agreement, 22 October 1984, Cmnd. 9451, Article 8.

²³ See, e.g., UK-Korea Air Services Agreement, 5 March 1984, Cmnd. 9263, Article 15; UK-Cameroon Air Services Agreement, 11 September 1981, Cmnd. 9124, Article 17; European Convention on Transfer of Sentenced Persons, 21 March 1983, Cmnd. 9617; European Convention on the Recognition of Studies, Diplomas and Degrees, 21 December 1979, Cmnd. 9762, Article 19.

²⁴ See, e.g., Agreement establishing an International Foot and Mouth Disease Vaccine Bank, 26 June 1985, Cmnd. 9602, Article XII.

is a party commonly contain clauses stating that they will remain in force until the last of the payments to the creditors thereunder has been made.²⁵ In such cases, the execution of the treaty is expressly made a ground for its expiry.

A variation of the last of those techniques was used in the case of the Sino-British Agreement of 2 August 1985 governing the exhibition of terracotta figures of warriors and horses of the Qin dynasty.²⁶ This provided in Article 9 that the Agreement 'shall remain in force until the obligations arising therefrom have been fulfilled'. That event would occur only on the return of the art treasures intact to the Chinese authorities or on the payment of compensation for any loss or damage or on the diplomatic settlement of any dispute arising from the agreement. Thus the treaty terminates when the parties agree, expressly or by implication, that it has been executed and that no disputes connected with the treaty remain to be resolved. The consensual element in the termination is present at the conclusion of the treaty and at the date when the parties confirm the settlement or absence of any dispute.²⁷

(b) *Execution of Object*

The language used in Article 54 (a) of the Vienna Convention of 1969 is broader than would be needed to express the self-evident proposition that a treaty terminates on the date specified for that purpose in the expiry clause. It is equally apt to embrace the case of termination of a treaty by the execution of its object. This is so not only in those relatively rare cases in which the treaty contains an express term to the effect that it shall cease to have effect once its object is achieved. Even where the treaty contains no such clause, it may be clear from the text as a whole that the treaty is extinguished on the execution of its object; and if this is so, its termination is accomplished 'in conformity with the provisions of the treaty'.

No other explanation can account for the breadth of the language used in Article 54 (a) nor for the absence from the Vienna Convention of any article dealing specifically with the termination of treaties on the execution of their object.²⁸ Such termination will seldom occur in the case of a treaty containing an expiry clause. Where no such clause is inserted, the text as a whole may evince an intention to modify the relations between the parties indefinitely; or alternatively to modify those relations for the purpose of

²⁵ See, e.g., Agreements with Liberia, 8 October 1984, Cmnd. 9410, Article 10; Morocco, 17 October 1984, Cmnd. 9394, Article 10; Malawi, 29 August 1984, Cmnd. 9375, Article 10.

²⁶ Cmnd. 9698.

²⁷ A dispute exists for these purposes so long as a party advances in good faith a claim resisted by the other. See Joseph L. Kunz, *The Changing Law of Nations* (1968), p. 684; T. Hassan, 'Good Faith in Treaty Formation', *Virginia Journal of International Law*, 21 (1981), p. 443.

²⁸ See *Yearbook of the ILC*, 1966, vol. 2, at p. 25. See also D. P. O'Connell, *International Law* (2nd edn., 1970), vol. 1, pp. 265-6; G. von Glahn, *Law Among Nations* (1986), p. 513; D. W. Greig, *International Law* (1st edn., 1970), p. 384; Capotorti, loc. cit. above (p. 133 n. 2), at pp. 525-7. Sinclair, op. cit. above (p. 134 n. 7), at p. 165, characterizes this as a 'strained interpretation' of Article 54 (a) but offers no alternative other than the conclusion that there is a *lacuna*.

achieving a specific object only. Thus an agreement to transfer territory is generally expressed without an expiry clause; but such an agreement is completed when the new sovereign acquires title. Likewise, an agreement whereby one State agrees to indemnify another for paying pensions to certain officials is liable to be expressed indefinitely; but on the death of the last-surviving official the agreement is executed.²⁹

Great caution must be exerted, however, in concluding that any agreement terminates on the execution of its object, in the absence of specific provision to that effect. The written evidence of the parties' consent is in the text. Moreover, an agreement having an immediate object may also contain provisions designed to produce continuing or permanent effects. Thus the Disengagement Agreement³⁰ between Egypt and Israel is not extinguished on the achievement of its immediate object, viz. the redeployment of forces in Suez, since it is designed to serve a continuing function in restraining the use of force by either party.

(c) *Application of Treaties after Dates in Expiry Clauses*

The converse problem may arise. A treaty containing an expiry clause may continue to be applied by the parties after the date specified therein. Some early writers suggest that in such an event the treaty remains in force.³¹ Their point of view might be taken to gain support from the use of the permissive word 'may' in Article 54 (a) of the Vienna Convention of 1969; but the tacit renewal (or novation) of treaties is not lightly to be established.³² Commonly the continued observance of the terms beyond the expiry date will be unaccompanied by a sense of obligation. Exceptionally, the practice of the parties may give rise to mutual obligations existing outside the framework of treaty law.³³ Only on the rarest of occasions will the practice of the parties establish an 'agreement regarding the interpretation' of the expiry clause so to permit us to construe that clause in a sense contrary to its prima-facie meaning.³⁴ On these occasions, there is *ex hypothesi* no novation of the agreement. Rather, the treaty continues in force 'in conformity with [its] provisions', duly interpreted in the light of its object and purpose.

²⁹ See, e.g., UK-Uganda Agreement of 1 October 1982, Cmnd. 9774.

³⁰ *International Legal Materials*, 14 (1975), p. 1449 (4 September 1975).

³¹ P. Fiore, *International Law Codified* (5th edn., trans. Borchard, 1918), Article 842; W. E. Hall, *International Law* (6th edn., 1909), p. 352; A. W. Heffter, *Le Droit international public de l'Europe* (3rd edn., 1873), p. 99.

³² E. de Vattel, *The Law of Nations* (trans. Fenwick, 1916), Book II, section 199.

³³ As to the availability of estoppel in international law, see Sir Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 203-6; Lord McNair, 'The Legality of the Occupation of the Ruhr', this *Year Book*, 5 (1924), at pp. 31-7; D. W. Bowett, 'Estoppel before International Tribunals', *ibid.* 33 (1957), p. 176; I. MacGibbon, 'Estoppel in International Law', *International and Comparative Law Quarterly*, 7 (1958), p. 468. See further *Arbitral Award by the King of Spain case*, *ICJ Reports*, 1960, p. 192 at p. 213; *Temple of Preah Vihear case*, *ibid.*, 1962, p. 6 at p. 32; *North Sea Continental Shelf cases*, *ibid.*, 1969, p. 1 at p. 26, and the *Nicaragua case*, *ibid.*, 1984, p. 392 at p. 415.

³⁴ Cf. Vienna Convention of 1969, Article 31 (3) (b).

III. DESUETUDE

It has long been accepted that a treaty terminates by desuetude when each of the parties has, over a sufficiently long period, ceased to make use of it or to resort to it and each other party has acquiesced in that discontinuance.³⁵ Desuetude is occasionally explained by analogy with principles of domestic law,³⁶ although a recent study has indicated that abrogation of statutes by desuetude is no longer part of any continental system, with the possible exceptions of Germany, Scotland and Norway, and that it has little basis in common law.³⁷ Lord McNair argued that there are four indispensable ingredients in desuetude: the frequent repetition of a failure to invoke the treaty; the imputability of such failures to the government; the absence of an alternative reasonable explanation; and the absence of protests reserving the rights of the party affected.³⁸ All four elements depend for their persuasiveness on their capacity of amounting to evidence of the intention, consent or acquiescence of the parties.

(a) *Omission from the Vienna Convention*

The absence of any mention of desuetude in the Vienna Convention of 1969 has been the subject of much comment, mainly of a critical character.³⁹ That absence is important because the Convention stipulates in Article 42 that the validity of a treaty can be impeached only through the application of its terms.⁴⁰ The International Law Commission was explicit in giving reasons for omitting mention of desuetude:

... the Commission considered whether 'obsolescence' or 'desuetude' should be recognised as a distinct ground of termination of treaties. But it concluded that, while 'obsolescence' or 'desuetude' may be a factual cause of the termination of a treaty, *the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty.* In the Commission's view, therefore, cases of 'obsolescence' or 'desuetude' may be considered as covered by [Article 51, paragraph (b)] under which a treaty may be terminated 'at any time by consent of all the parties.'⁴¹

³⁵ McNair, *The Law of Treaties* (1961), p. 516; Detter, *op. cit.* above (p. 134 n. 12), at p. 93.

³⁶ McNair, *loc. cit.* above (p. 133 n. 2), at p. 466, records that in 1818 an accused succeeded in insisting upon trial by combat, thereby indicating that desuetude is not known in English law. See Lauterpacht, *op. cit.* above (p. 137 n. 33), at p. 160.

³⁷ A. Vamvoukos, *Termination of Treaties in International Law: The Doctrines of Rebus Sic Stantibus and Desuetude* (1985), at p. 245. See, however, *O'Hanlon v. Myers*, 10 Rich. L 128; *Wright v. Crane*, 13 S & R 447 (Pa. 1826).

³⁸ *Op. cit.* above (n. 35), at p. 518.

³⁹ Capotorti, *loc. cit.* above (p. 133 n. 2), at p. 519; P. Reuter, *Introduction au droit des traités* (1972), at p. 190; M. Villiger, *Customary International Law and Treaties* (1985), at p. 212; W. Karl, *Vertrag und Spätere Praxis im Völkerrecht* (1983), pp. 357 and 375; see also S. Rosenne's report to the Institute of International Law, *Annuaire de l'Institut de Droit International*, 52 (1967), p. 109.

⁴⁰ The rule leaves aside State succession, now governed by the Vienna Convention of 1978 (*loc. cit.* above, p. 133 n. 6) and State responsibility and the outbreak of hostilities. See Article 73 of the Vienna Convention of 1969. The procedural safeguards set out in Articles 65-8 of the Vienna Convention of 1969 are expressly applicable wherever a party invokes a ground for terminating the treaty.

⁴¹ *Yearbook of the ILC*, 1966, vol. 2, p. 237 (emphasis added).

The Commission's decision on this matter has been criticized by Professor Capotorti⁴² on the ground that desuetude has its basis in customary international law and not in implied consent. In his words:

. . . la doctrine dominante contemporaine reconnaît à la coutume une pleine autonomie de caractère par rapport à l'accord, et la réalité des relations juridiques internationales assigne à la pratique des États un rôle qui dépasse largement le schéma de l'accord tacite.

However, the academic authorities on which he relies for the first of those propositions go no further than to suggest that international custom derives its legal character from imperatives other than consent;⁴³ and as we shall see, State practice and the judgments of international tribunals tend to support rather than to undermine the view that desuetude is to be explained by reference to implied consent.

(b) *Modern Significance of Customary Rules*

Before examining those judgments and that practice it is necessary to dispose of a preliminary issue. It has been suggested that Professor Capotorti's criticism of Article 42 is misplaced, since the Vienna Convention of 1969 was never intended to address the impact of customary law on treaties. On this view, Article 42 deals only with contractual means of terminating treaties.⁴⁴ There is some support for this approach in Professor Capotorti's article. He maintains that even after the entry into force of the Vienna Convention of 1969, customary law provides a basis for the termination of treaties, especially in view of the affirmation in the preamble that customary international law 'will continue to govern questions not regulated by the provisions of the present Convention'.⁴⁵

It is, however, unconvincing thus to attempt to avoid, or to overcome, Professor Capotorti's objection to the omission of desuetude from the Convention. Neither the wording of Article 42⁴⁶ nor the explanation offered by the International Law Commission⁴⁷ supports the view that it was intended to allow for the termination of treaties by customary means other than those specified in it. On the contrary, the Report of the International Law Commission to the General Assembly shows that the object of Article 42 is to provide a safeguard for the stability of treaties. In stating

⁴² Loc. cit. above, p. 133 n. 2.

⁴³ M. Virally in M. Sorensen (ed.), *Manual of Public International Law* (1968), p. 135; A. D'Amato, 'The Authoritativeness of Custom in International Law', *American Journal of International Law*, 53 (1970), p. 491. See also C. Parry, *The Sources and Evidences of International Law* (1965), p. 59 (cited by D'Amato, loc. cit., at p. 494).

⁴⁴ Villiger, op. cit. above (p. 138 n. 39), at p. 212.

⁴⁵ Loc. cit. above (p. 133 n. 2), at p. 520.

⁴⁶ '(1) The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

'(2) The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention . . . '.

⁴⁷ Loc. cit. above, p. 138 n. 41.

that the validity of a treaty might be impeached only through the application of the Vienna Convention of 1969, the Commission 'intended to indicate that the grounds of . . . termination . . . provided for in the [Convention] are exhaustive of all such grounds, apart from any special cases expressly provided for in the treaty itself'.⁴⁷ To admit the possibility of termination of treaties in consequence of rules of customary law other than those codified in the Vienna Convention of 1969 would be to reintroduce the element of instability that Article 42 aspires to eradicate. As for the reference to customary law in the preamble, this is neutral, at best. One cannot place reliance upon it without begging the question whether the termination of treaties by desuetude is a matter 'regulated by the provisions of the present Convention'. The Reports of the International Law Commission suggest that it is so regulated.

(c) *Case Law*

In the arbitration between Great Britain and Portugal in the case of *Yuille, Shortridge and Co.*,⁴⁸ it was argued on behalf of Portugal that Article 7 of an Anglo-Portuguese Treaty of 1654 had been extinguished as a result of a long and persistent failure to rely upon it. The Senate of Hamburg, as arbitrator, held that it was insufficient for Portugal to show that over a long period British subjects had failed to invoke the contested article. It was necessary to show that the failure was imputable to the British Government. The Senate acknowledged that if Portugal had been able to produce such evidence, its claim would have succeeded. The language in which this acknowledgement was made was carefully phrased:

La question changerait de caractère si le gouvernement de la G.-B. avait à plusieurs reprises refusé d'intervenir, estimant que le traité était tombé en désuétude, ou s'il avait, pour le même motif, renoncé à poursuivre une intervention commencée. Car il est certain qu'il appartient aux gouvernements d'abroger expressément un traité ou d'en suspendre l'usage, ce qui devra être regardé par leur sujets comme une désuétude dérogeant au traité.

Thus, desuetude was contemplated as the result of a governmental decision: the mirror image of express denunciation. There must be evidence of the government's implicit consent to abandon the treaty.

More recently, the desuetude of the General Act for the Pacific Settlement of Disputes⁴⁹ was called in question in the first stage of the litigation in the *Nuclear Tests* case.⁵⁰ Australia there asked the Court to give an indication of interim measures of protection. The Australian claim for interim relief was based in part on Article 33 of the General Act of 1928;⁵¹

⁴⁷ Loc. cit. above, p. 138 n. 41.

⁴⁸ Lapradelle and Politis, *Recueil d'arbitrages internationaux*, vol. 2, p. 78 at p. 105 (21 October 1861).

⁴⁹ Geneva, 26 September 1928, *League of Nations Treaty Series*, vol. 93, p. 343.

⁵⁰ *ICJ Reports*, 1973, p. 99.

⁵¹ 'In all cases where a dispute forms the object of arbitration or judicial proceedings, and

and its claim that the Court had jurisdiction was based on Article 17⁵² of the General Act as well as on Articles 36 and 37 of the Statute.⁵³ Since the Court was able to dispose of the request for interim measures on the basis of Article 41 of the Statute, it was unnecessary to decide whether the General Act remained in force. Even so, the point was fully canvassed in argument. On behalf of Australia it was contended that none of the articles in the Vienna Convention acknowledged the operation of desuetude as an independent cause of the termination of a treaty.⁵⁴ At the date of the judgment on the main action, several members of the Court adverted indirectly to the argument advanced on behalf of Australia at an earlier stage.

In their joint dissenting opinion, Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock found unconvincing the argument advanced by the French Government that the Act of 1928 could not serve as a basis for jurisdiction because it had fallen into desuetude. Observing that desuetude is not mentioned in the Vienna Convention of 1969, and that the omission was deliberate, they concluded that the legal basis for any termination of a treaty by desuetude is the consent of the parties to abandon the treaty. In the present case, it was impossible to infer on the part of France 'consent to abandon the Act'.⁵⁵ Judge De Castro took a similar view. In order to prove tacit abrogation, it was necessary 'to produce proof of the *facta concludentia* which would have to be relied on to demonstrate the *contrarius consensus* of the parties'.⁵⁶ Judge *ad hoc* Sir Garfield Barwick also concluded that there was no basis in the material before the Court to warrant the conclusion 'that the General Act had been terminated by mutual consent of the parties'. In the absence of evidence of such consent there could be no desuetude.⁵⁷

Similar issues arose in the *Aegean Sea Continental Shelf* case.⁵⁸ In that case Greece specified two bases on which it sought to found the jurisdiction of the Court: Article 17 of the General Act for the Pacific Settlement of Disputes⁵⁹ and Articles 36 and 37 of the Statute. The

particularly if the question on which the parties differ arises out of acts already committed, the Permanent Court of International Justice, acting in accordance with Article 41 of its Statute, or the Arbitral Tribunal, shall lay down within the shortest possible time the provisional measures to be adopted.'

⁵² 'All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice . . .'

⁵³ *ICJ Reports*, 1973, at p. 103. The arguments advanced on behalf of Australia on the issue of the General Act of 1928 were, however, sufficient to induce the Court to conclude 'that the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded'.

⁵⁴ *ICJ Pleadings*, vol. 1, p. 184 at p. 222.

⁵⁵ *Ibid.* at p. 381 (dissenting opinion).

⁵⁷ *Ibid.* at p. 405. Later the Judge stated that the instant case was not one of 'States having reason to resort to the provisions of the treaty and bypassing or ignoring its provisions by *mutual consent*'. Nor could it be said that France and Australia had 'by inactivity, *tacitly agreed* to terminate the General Act as between themselves': *ibid.*, pp. 415-16 (emphasis added).

⁵⁸ *ICJ Reports*, 1978, p. 1.

⁵⁵ *ICJ Reports*, 1974, at p. 338.

⁵⁹ Above, n. 52.

Turkish Government took the position that the General Act was no longer in force, but the Court was spared the necessity of deciding upon the point. It had no jurisdiction in view of the reciprocal application of a reservation made by Greece, whereby she excepted disputes relating to her 'territorial status'.⁶⁰

In a declaration which is short to the point of terseness,⁶¹ Judge Morozov stated that the General Act of 1928 was an inseparable part of the League of Nations and was extinguished with the League. This seems to suggest that the expiration of the Act came about not by desuetude but by implied repeal. His conclusion was contradicted by Judge De Castro,⁶² who took the view that the General Act was still in force, for the reasons given in the *Nuclear Tests* case. The full Court appears to have implied that the Act is still in force, for it referred to the fact that only two States had denounced it, while a considerable number of other States had failed to do so.⁶³

Most recently the nature of desuetude has received clarification in the arbitral decision of 30 June 1977 on the *Delimitation of the Continental Shelf between the United Kingdom and France*.⁶⁴ In response to a British argument based on the Geneva Convention of 1958 on the Continental Shelf,⁶⁵ the French Government contended that all the Geneva Conventions on the Law of the Sea had become obsolete as a result of the recent evolution of customary law stimulated by the Third United Nations Conference on the Law of the Sea. The Court of Arbitration dismissed this somewhat audacious contention,⁶⁶ while acknowledging that a 'development in customary law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights'.⁶⁷ This language indicates that the basis of desuetude is the implied consent of States to abandon rights previously enjoyed. That is why the Court was reluctant to discover evidence of abandonment of treaty rights acquired as recently as in 1958. Only 'the most conclusive indications of the intentions of the parties to the 1958 Convention to regard it as terminated could warrant this Court in treating it as obsolete'.⁶⁸

⁶⁰ *ICJ Reports*, 1978, p. 1 at pp. 17 and 21.

⁶¹ *Ibid.* at p. 54.

⁶² *Ibid.* at p. 62.

⁶³ *Ibid.* at p. 16. The issue was raised again in the *Trial of Pakistani Prisoners of War* case, *ICJ Reports*, 1973, p. 328, where India contended that the Act was not in force or, in any event, was inapplicable to her.

⁶⁴ *International Legal Materials*, 18 (1979), p. 397 at p. 417.

⁶⁵ 29 April 1958, *United Nations Treaty Series*, vol. 570, p. 344. For UK objections to certain declarations and reservations by France, see *ibid.*, vol. 551, p. 334.

⁶⁶ The language is that of Professor D. W. Bowett in 'The Arbitration between the United Kingdom and France concerning the Continental Shelf Boundary in the English Channel', this *Year Book*, 49 (1978), p. 1 at p. 4.

⁶⁷ *International Legal Materials*, 18 (1979), p. 397 at p. 417 (emphasis added).

⁶⁸ *Ibid.* (emphasis added). There is, perhaps, some support for this approach in the judgments of the Iran-US Claims Tribunal. Despite an unambiguous implication to the contrary in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, *ICJ Reports*, 1980, p. 3 at p. 32,

(d) *State Practice*

The practice of States within international organizations provides several examples of the termination of treaties by desuetude although it must be acknowledged that none is without difficulty. Article 18 of the League Covenant declared that international engagements entered into by members of the League should be of no legal force unless registered with the Secretariat; nevertheless, such treaties appear to have been treated by members of the League as valid.⁶⁹ Member States of the European Communities have agreed to disregard the provisions of the EEC Treaty relating to voting by qualified majority without amending or revoking those provisions.⁷⁰ The League's practice of failing to take decisions contrary to the vote of the mandatory may have matured into an agreement during the initial period of functioning of the League but it fell into desuetude thereafter.⁷¹ The minorities treaties placed under guarantee of the League ceased over a period of time to prove reliable.⁷²

If these examples can be accepted as true instances of desuetude this must surely be because the practice of the parties indicates in each case that they had consented to allow their earlier engagement to lapse, at least for the purposes of their mutual relations. Thus, in the case of the practice of the European Community States, the 'Luxembourg Accords', which record an intention to dispense with qualified majority voting, do not modify the EEC Treaty, nor even purport to do so; but they amount to evidence of a common consent to depart from the terms of that Treaty; and subsequent practice constitutes further evidence of the new common intent.

Iran has argued that it is no longer bound by the Treaty of Amity, Economic Relations and Consular Rights concluded between Persia and the US at Tehran on 15 August 1955, *United Nations Treaty Series*, vol. 284, p. 93. The basis of the Iranian argument is not entirely clear but may be founded in part on obsolescence. Such an argument would be of interest also for the treaties between Persia and the UK of 4 March 1857, *British and Foreign State Papers*, vol. 47, p. 42, and 9 February 1903, *ibid.*, vol. 96, p. 51. See *Anglo-Iranian Oil Company case*, *ICJ Reports*, 1952, p. 93 at p. 108. The Tribunal as a whole has never yet had cause to pronounce in a reported judgment on the Iranian claim in this regard. In separate opinions, some members of the Tribunal have expressed the view that the Treaty of 1955 is still in force. See the concurring opinion of R. M. Mosk in *American International Group v. Iran*, *Iran-US Claims Tribunal Reports*, 4 (1983-III), p. 96 at p. 112, and his dissenting opinion in *Schering Corporation v. Iran*, *ibid.* 5 (1984-I), p. 361 at p. 382; dissenting opinion of H. M. Holtzmann in *Grimm v. Iran*, *ibid.* 2 (1983-I), p. 78 at p. 84; concurring opinion of G. M. Aldrich in *IFT Industries v. Iran*, *ibid.*, p. 348 at p. 353.

⁶⁹ See P. Guggenheim, 'Les Principes de droit international public', *Recueil des cours*, 80 (1952-I), p. 1 at p. 52; McNair, *op. cit.* above (p. 138 n. 35), at p. 180; *Mavrommatis Palestine Concessions case*, *PCIJ*, Series A, No. 2 (1924), at p. 33.

⁷⁰ For the rules in the EEC Treaty governing voting procedure in the Council, see Article 148 (2) thereof, amended by Article 14 of the Act of Accession, modified by Article 8 of the Adaptation Decision. For the Luxembourg Accords of 28 and 29 January 1966, see *Bulletin of the European Communities*, 1966, no. 3, p. 8. See further O. van der Gabelentz, 'Luxembourg Revisited or the Importance of European Political Co-operation', *Common Market Law Review*, 16 (1979), p. 685.

⁷¹ See the separate opinion of Judge Sir Hersch Lauterpacht in the *South West Africa (Voting Procedure) case*, *ICJ Reports*, 1955, at p. 102.

⁷² But see G. Haraszti, *Some Fundamental Problems on the Law of Treaties* (1973), at p. 359, who characterizes this as a case of fundamental change of circumstances. See further J. L. Brierly, 'Some Considerations on the Obsolescence of Treaties', *Transactions of the Grotius Society*, 2 (1926), p. 11.

The conclusion to be drawn from these materials appears to be that desuetude is invariably a form of termination by consent, at least in the case of treaties governed by the Vienna Convention of 1969. It follows that where one party to a treaty demands its termination on the ground of obsolescence and any other party objects, the former cannot insist as against the latter on the termination of the treaty in accordance with a presumed rule of customary law.⁷³

(e) *Procedure*

A special difficulty is created by the closing words of Article 54 (b) of the Vienna Convention of 1969. This envisages that the termination of a multilateral treaty may take place at any time by consent of all the parties 'after consultation with the other contracting States'. It might be argued that if mere contracting States have to be consulted before a treaty terminates, the parties are entitled to expect consultation also.⁷⁴ It must be acknowledged that the drafting of Article 54 (b) is imperfect. The word 'consultation' is redolent with ambiguity. Moreover, an examination of the *travaux préparatoires* fails to disclose any passage at which attention was paid to the relationship between such consultation and desuetude.

It was only at an advanced stage in the drafting of the Convention that it was proposed to add to Article 54 (b) the words 'after consultation with the other contracting States'. The purpose of the amendment was to ensure that the wishes of those States should not be disregarded by the parties, on the principle that contracting States have an interest in the matter, although not so great an interest as the parties.⁷⁵ From this it appears that consultation denotes something less than consent; and if it is accepted that consent may be tacit, it must follow that consultation need not be formal.

Indeed, the word 'consultation' implies something less than negotiation. Domestic case law⁷⁶ and international practice⁷⁷ support the conclusion,

⁷³ Different considerations arise when there is a change of circumstances following the conclusion of the treaty. In such an event there may be cause to apply the principle *pacta sunt servanda* or that of good faith. Dealing with the second of those principles, Zoller has written: 'La question se pose de savoir si un État n'agirait pas de mauvaise foi en continuant d'exiger l'application d'un traité qui, conclu à l'origine sur une base d'égalité entre les parties, se trouve ultérieurement vicié par la survenance d'un déséquilibre des prestations entre les parties, notamment à la suite d'un changement de circonstances': E. Zoller, *La Bonne foi en droit international public* (1977), at p. 86. See also A. Verdross, *Völkerrecht* (1964), p. 180; *Nuclear Tests cases*, ICJ Reports, 1974, at pp. 268 and 473.

⁷⁴ It will be recalled that a 'contracting State' is defined in Article 1 (f) as a State which has consented to be bound by the treaty, whether or not the treaty has entered into force, whereas a 'party' is defined in Article 1 (f) as a State which has consented to be bound by the treaty and for which the treaty is in force.

⁷⁵ The amendment originated in Dutch and Hungarian proposals: see *UN Conference on the Law of Treaties*, Official Records, 58th meeting and 81st meeting.

⁷⁶ *R v. Mbete*, 1954 (4) SA 491; *R v. Ntlemenza*, 1955 (1) SA 2/2. See also *Fletcher v. Minister of Town and Country Planning*, [1947] 2 All ER 496 at 500; *Rollo v. Minister of Town and Country Planning*, [1948] 1 All ER 13 at 17; *Attorney-General v. F. N. Perry Construction Pty. Ltd.* (1961), 6 LGRA 385 at 391; *College of Physicians and Surgeons v. Herbert* (1935), 65 CCC 285 (Qu.).

⁷⁷ At the meeting on 24 January 1950 of the League Mandates Commission, the Belgian delegate said of the expression 'après consultation' (which is the expression used in the French version of

which is also suggested by the context, that 'consultation' denotes an opportunity to state views. The possibility cannot be excluded that even the silence of a contracting State may constitute its part in the process of 'consultation', provided that occasion has arisen for it to make its views known.⁷⁸

IV. TREATIES WITHOUT DENUNCIATION CLAUSES

(a) *Perpetual Treaties*

Few problems arising in connection with the extinction of treaties have caused such controversy as the claim that a treaty containing no denunciation or expiry clause is terminable at any time by the unilateral act of a party. On the one hand, there are writers who counsel against the inference of any right of termination in such cases, reasoning that the parties' omission of an expiry or denunciation clause is evidence of their intention to make the treaty permanent.⁷⁹ Such writers are apt to cite in support of their cause the famous Declaration of London of 1871, which asserted that it is a fundamental principle of international law that no power may relieve itself of obligations under a treaty nor modify the terms thereof other than with the assent of all the other parties given by means of an agreement freely concluded. On the other hand, there are those who assert that treaties without denunciation clauses are always subject to an implied power of denunciation.⁸⁰ Among those in the second of these groups is Professor Giraud, whose report to the Institute of International Law contained the following assertion:

Refuser aux parties le droit de dénoncer les conventions générales pour lesquelles la convention elle-même n'a pas fixé un terme, ce serait reconnaître à la convention un caractère de perpétuité à laquelle raisonnablement elle ne saurait prétendre.⁸¹

Very few modern treaties are explicitly stated to be perpetual in

Article 54 (b) of the Vienna Convention of 1969): 'Après consultation est certainement plus précis que "demander l'avis" mais ni l'un ni l'autre de ces expressions ne va aussi loin que "avec d'accord de".'

⁷⁸ Cf. *Dictionnaire de la terminologie de droit international* (1960), p. 160: 'l'examen en commun d'une affaire, d'une situation, d'un incident, de l'attitude à adopter, de mesures à prendre, le fait de prendre, à cette occasion, l'avis d'un autre gouvernement'; and Ignacio-Rivera-García, *Diccionario de Términos Jurídicos* (1977): 'Parecer o dictamen que de palabra o por escrito se pide o se da sobre alguna cosa asunto o problema.'

⁷⁹ Brierly, loc. cit. above (p. 143 n. 72), at p. 11; R. B. Stewart, *Treaty Relations of the British Commonwealth of Nations* (1939), p. 338.

⁸⁰ A.-C. Kiss, 'L'Extinction des traités dans la pratique française', *Annuaire français de droit international*, 5 (1959), p. 784 at p. 787 and sources cited there; L. Oppenheim, *International Law*, vol. 1 (8th edn., by Lauterpacht, 1955), p. 505; Haraszti, op. cit. above (p. 143 n. 72), at p. 261. McNair, loc. cit. above (p. 133 n. 2), at p. 532, writes: 'nous croyons qu'on peut admettre qu'il y a des traités qui peuvent être dénoncés à volonté et que le seul critère qui permette de déterminer si un traité peut ou non être dénoncé dans les conditions décrites ci-dessus réside dans l'intention des parties'; see also id., op. cit. above (p. 138 n. 35), at pp. 501-5.

⁸¹ Loc. cit. above (p. 133 n. 2), at p. 73.

operation⁸² although a few are described as 'indefinite'.⁸³ It seems reasonable to infer, at least in the case of treaties designated as permanent, that no party can denounce them without obtaining the consent of the other party, if they are bilateral, or of all the other parties, if multilateral. A similar inference appears to be warranted in the case of treaties designated as valid for a very long but specified period, such as ninety-nine years.⁸⁴ Even this conclusion, commanded by language of the text, might be challenged on the ground advanced by Professor Haraszti. In his view, a perpetual treaty amounts to a burden of such exceptional severity that the language used in the text may need to be tempered by the principle of State sovereignty.⁸⁵ The inference he draws from that principle is not always justified; for an undertaking to obtain the assent of partners before abrogating a treaty is itself a manifestation of sovereignty. Nevertheless, the correctness of his method can scarcely be challenged. Professor Haraszti's argument is based on the proposition that the guiding principle is the ascertainment of the parties' intentions, or consent.

(b) *The Significance of Silence*

More frequent and more troublesome is the case of the treaty which is silent as to duration and denunciation. Such treaties are by no means uncommon. Among those falling into this category are the Charter of the United Nations,⁸⁶ the Geneva Conventions of 1958 on the Law of the Sea,⁸⁷ the International Covenants of 1966,⁸⁸ the WHO Nomenclature Regulations⁸⁹ and the Vienna Convention itself. The Harvard Draft sought to eliminate the right of denunciation altogether in such cases. In

⁸² An exception is provided by the Antarctic Treaty, Washington, 1 December 1959, *United Nations Treaty Series*, vol. 402, p. 71, which states in its preamble that 'Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord'. See, however, Article 12 thereof.

⁸³ See the Brussels Convention on the Recognition and Enforcement of Judgments, 27 September 1978, *Official Journal*, 1978, L.304/77; the Community Patent Convention, 15 December 1975, *ibid.*, 1976, L.17/1; and the European Convention on the Mutual Recognition of Companies, 29 February 1968, *Bulletin of the European Communities*, 1969, Supplement 2.

⁸⁴ The Agreement between the US and the Philippines concerning Military Bases, Manila, 14 March 1947, *United Nations Treaty Series*, vol. 43, p. 272, is expressed to be in force for ninety-nine years subject to renewal (Article 29). The argument has been advanced that it can be abrogated unilaterally, either on ground of *jus cogens* or on the ground of a fundamental change of circumstances: L. Mondragon, 'The Grounds under International Law for the Abrogation of the Philippine-United States Military Bases Agreement', *Philippine Law Journal*, 52 (1977), p. 466. *Sed quaere*.

⁸⁵ 'If no conclusion whatever can be drawn from the treaty as to the intention of the parties, the right of denunciation will have to be recognised, following from the principle of international law demanding respect for State sovereignty': *op. cit.* above (p. 143 n. 72), at p. 264 (emphasis added).

⁸⁶ San Francisco, 26 June 1945, *United Nations Treaty Series*, vol. 1, p. xvi.

⁸⁷ Convention on the Territorial Sea, 29 April 1958, *ibid.*, vol. 516, p. 205; Convention on the High Seas, 29 April 1958, *ibid.*, vol. 450, p. 82; Convention on Fishing and the Conservation of the Living Resources of the High Seas, 29 April 1958, *ibid.*, vol. 559, p. 285; Convention on the Continental Shelf, 29 April 1958, *ibid.*, vol. 499, p. 311.

⁸⁸ International Covenant on Civil and Political Rights, New York, 16 December 1966, *UK Treaty Series*, 1977, no. 6, and International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, *ibid.*

⁸⁹ Geneva, 22 May 1967, *ibid.*, 1969, no. 7.

this respect it followed Fiore's proposal.⁹⁰ The object of the rule advanced in that Draft and proposal was, of course, to preserve the stability of treaties; but its vice was its inflexibility. Where the treaty is silent or ambiguous as to its period of validity, the absence of a clause stating that it is to be of permanent duration may be as significant as the absence of a clause setting a term to the agreement. To characterize all such treaties as indissoluble is to attribute to some of them a degree of permanence unintended by the parties.

In this respect the wording of the Vienna Convention of 1969 is more satisfactory than that of the Harvard Draft; but it is open to a different objection. It reads as follows:

A treaty which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- b) a right of denunciation or withdrawal may be implied by the nature of the treaty.⁹¹

Thus there is a rebuttable presumption that the Treaty is not terminable without the consent of the other party or parties. Paragraph (a) provides that the parties' intentions shall be the determining factor; and paragraph (b) provides that the presumption may be rebutted on the basis of 'the nature of the treaty'. Paragraph (b), which was adopted by 26 votes to 25, with 37 abstentions, introduces a new element and one which may in some cases conflict with the element suggested in the preceding paragraph.

It is possible to trace to the early discussions of the International Law Commission the development of the pair of rules now contained in the Vienna Convention of 1969. In 1957 Sir Gerald Fitzmaurice concluded that 'silence means, in principle, no termination except by general consent' and added (more controversially) that to this there are two exceptions. The first was where an inference was to be drawn from the treaty as a whole as to its duration. Secondly, he wrote, 'it is generally thought that there are certain sorts of treaties which, unless entered into for a fixed and stated period, or expressed to be in perpetuity, are by their nature such that any of the parties to them must have an implied right to bring them to an end'.⁹² It was left to Sir Humphrey Waldock⁹³ to endeavour to draft an article identifying those treaties which, 'by their nature', are terminable even in the absence of a denunciation clause or the assent of the other parties or evidence of a common intention that the agreement should be terminable. Sir Humphrey's draft has been appraised

⁹⁰ Loc. cit. above (p. 133 n. 2), Article 34: 'A treaty may be denounced by a party only when such denunciation is provided for in the treaty or consented to by all the other parties. . . .' For Fiore's proposal see *International Law Codified* (5th edn., trans. Borchard, 1918), Article 830: 'Unilateral denunciation may be effectual in annulling a treaty only when the right is recognised in the treaty. . . .'

⁹¹ Article 56 (1).

⁹² *Yearbook of the ILC*, 1957, vol. 2, at pp. 38-9.

⁹³ *Ibid.*, 1963, vol. 2, at p. 64.

in an earlier issue of this *Year Book*⁹⁴ and it did not commend itself to the Commission as a whole. For these reasons it need not be examined at this point. His attempt illustrates, however, the grave difficulty of the task; and its fate suggests that the 'nature of the treaty' is a most unreliable indicator of its terminability.

Two examples may serve to illustrate the point. Sir Humphrey classified among the treaties that must be considered terminable 'a commercial or trading treaty other than one establishing an international regime for a particular area'. There is of course widespread authority for the proposition that commercial treaties are seldom intended to be permanent. Governments have not invariably taken the view, however, that all such treaties are terminable. When the US sought to denounce certain commercial agreements concluded with France,⁹⁵ the Government of the latter 'represented to the Federal Government that as our conventions did not contain any dissolving clause they were of a permanent nature, and that in order to break them at any time an understanding at least was necessary'.⁹⁶ On the other hand, Sir Humphrey classified among the group of treaties that continue in force indefinitely any treaty 'effecting a grant of rights in or over territory'. In 1895, however, the French Minister of Foreign Affairs addressed his ambassador in London in these words:

Les Anglais ne peuvent pas penser que nous resterons liés éternellement par leur capitulation avec le Bey de Tunis. Notre thèse a toujours été que les traités perpétuels sont toujours revisables sur la dénonciation d'une des parties.⁹⁷

It is not doubted, of course, that commercial agreements tend to be transient, and so subject to unilateral denunciation, while agreements granting rights in or over territory tend to be permanent. To these general rules there are, however, a few exceptions. Had the International Law Commission omitted paragraph (b) from Article 56 (1) of the Vienna Convention of 1969, it would still have been possible—indeed essential—to take into account the nature of a treaty (meaning its subject-matter and its objects) for the purpose of determining whether it could be denounced unilaterally. The nature of the treaty would have been relevant as an indicator of the parties' intentions in the matter. The text that emerged from the Conference gives rise to difficulty since it suggests that the nature of the treaty may have a significance other than as a pointer to the parties' consent.⁹⁸

⁹⁴ K. Widdows, 'The Unilateral Denunciation of Treaties containing no Denunciation Clause', this *Year Book*, 53 (1982), p. 83 at pp. 85–9.

⁹⁵ Treaties of 28 May 1898, 20 August 1902 and 28 January 1908, Malloy, *Treaties between the United States and other Powers*, vol. 1, pp. 542, 543 and 547.

⁹⁶ *Foreign Relations of the United States*, 1909, p. 250. It is acknowledged that the protest contains a *non-sequitur*; but it may well have been demonstrated that the parties did not intend that they should be terminable unilaterally.

⁹⁷ *Documents diplomatiques français*, 1st series, vol. 12, no. 180, cited by Kiss, loc. cit. above (p. 145 n. 80), at p. 787.

⁹⁸ The view here expressed is shared by Professor Capotorti, loc. cit. above (p. 133 n. 2), at

(c) *Senegal's Denunciation of the Geneva Conventions*

The nature of the difficulty is illustrated in the difference between the UK and Senegal arising from the latter's purported denunciation of certain of the Geneva Conventions of 1958 on the Law of the Sea.⁹⁹ On 9 June 1971 the Secretary-General of the UN received a communication from Senegal denouncing the Conventions on the Territorial Sea and on Fishing and the Conservation of the Living Resources of the High Seas.¹⁰⁰ On 1 March 1976 he received a similar communication purporting to denounce the Convention on the Continental Shelf.¹⁰¹ On both occasions the UK addressed a note to the Secretary-General placing on record its view that those Conventions are not susceptible to unilateral denunciation and that Senegal continued to be bound by the obligations assumed on ratification.¹⁰² If the rule set out in Article 56 (1) of the Vienna Convention of 1969 is to be applied,¹⁰³ Senegal's claim to denounce the treaties must be assessed in the light of (a) the parties' intentions and (b) nature of the treaty.

Few deductions, if any, can be drawn from the 'nature' of the three Conventions denounced by Senegal. It has been argued that these Conventions codify customary law; and that as States cannot relieve themselves of obligations under customary law generally, the position should be no different when the customary rule is codified.¹⁰⁴ It must be acknowledged that much in the three Conventions denounced by Senegal reflects customary law,¹⁰⁵ and much in them gave rise to new customary law,¹⁰⁶ but it is no less clear that much amounted to innovation lacking universal acceptance.¹⁰⁷ The parties to those Conventions drew attention to the point in the preambles: the Convention on the High Seas proclaims a desire to codify customary law whereas the remaining three Conventions

pp. 484-5. Judge Elias seeks to overcome the difficulty created by the Vienna Convention of 1969 by arguing that the character of the treaty is relevant as evidence of the parties' intentions: *op. cit.* above (p. 135 n. 17), at pp. 105-6.

⁹⁹ Above, p. 146 n. 87.

¹⁰⁰ *United Nations Treaty Series*, vol. 781, p. 332.

¹⁰¹ Registered under No. 7302.

¹⁰² *Multilateral Treaties Deposited with the Secretary-General* (1982), p. 614 n. 3 and p. 629 n. 2.

¹⁰³ By Article 4 the Convention applies only to treaties concluded after its entry into force; but this is without prejudice to the application of customary rules codified in the Vienna Convention of 1969. Dr Akehurst has suggested that the rule contained in paragraph (b) of Article 56 (1) does not reflect customary law: see R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 7 (1984), at p. 507.

¹⁰⁴ D. Bardonnet, 'La Dénonciation par le gouvernement sénégalais de la convention sur la mer territoriale et la zone contiguë et de la convention sur la pêche et la conservation des ressources biologiques de la haute mer en date à Genève du 29 avril 1958', *Annuaire français de droit international*, 18 (1972), p. 123 at p. 157.

¹⁰⁵ Thus the Convention on the Territorial Sea embodied the guiding principle of straight lines established in the *Anglo-Norwegian Fisheries* case, *ICJ Reports*, 1951, at pp. 128-9.

¹⁰⁶ See *North Sea Continental Shelf* cases, *ibid.*, 1969, p. 3 at p. 105; see further R. Baxter, 'Multilateral Treaties as Evidence of Customary International Law', this *Year Book*, 41 (1965-6), p. 275; I. F. I. Shihata, 'The Treaty as a Law-declaring and Custom-making Instrument', *Revue égyptienne de droit international*, 22 (1966), p. 51.

¹⁰⁷ See the comments of Judge Spiropoulos, cited by Bardonnet, *loc. cit.* above (n. 104), at p. 157.

contain no such proclamation. No doubt this accounts for Senegal's failure to denounce the Convention on the High Seas.

There is nothing in the 'nature' of multilateral agreements establishing standards on the law of the sea which requires us to regard them as permanent or incapable of denunciation. Indeed, the UN Convention on the Law of the Sea provides expressly that a State may by written notice addressed to the Secretary-General of the UN denounce that Convention and may give its reasons. Further emphasis is given to the point by the following sentence in the provision, whereby failure to indicate reasons is not to affect the validity of the denunciation.¹⁰⁸

On the other hand, a particular multilateral agreement may be intended to play a role in the progressive development of international law; and it might well be inconsistent with that objective to permit unilateral denunciation, a facility which would tend to arrest the move towards consensus in the area of law governed by the treaty. The early records of the International Law Commission¹⁰⁹ and the records of the conference of 1958¹¹⁰ suggest that this was indeed the intention of the parties and that view is confirmed by contemporary authors.¹¹¹ It is on the basis of material establishing the parties' intentions that the Senegalese denunciation must be assessed.¹¹²

(d) *International Organizations*

The constitutions of international organizations present a special problem in this context since there is some support for the view that there is an implied right of withdrawal from such organizations in general.¹¹³ The possibility that special rules might apply to certain international organizations, in this respect, was among the considerations that led the International Law Commission to insert into its draft the present Article 5 of the Vienna Convention of 1969. The latter provides that the Convention is to apply to the constitutions of international organizations, without prejudice to any relevant rules of the organization. Thus it modifies the effect of Article 56 in relation to such constitutions.

There is no reason to confine a search for those relevant rules to the constitutional document. The latter is but one of the many sources in which the member States' consent finds expression. Professor Schermers

¹⁰⁸ Montego Bay, 10 December 1982, *International Legal Materials*, 21 (1982), p. 2161, Article 317.

¹⁰⁹ *Yearbook of the ILC*, 1949, p. 43. See also UN General Assembly Res. 798 (VIII) of 7 December 1953.

¹¹⁰ A/CONF.13/L.12 Annex. See also comments of Mr Tunkin, 11th plenary meeting, 23 April 1958, Summary Record, A/CONF.13/38, p. 25.

¹¹¹ H. A. Smith, *The Law and Custom of the Sea* (1959), p. 9; Nagendra Singh, *The Legal Regime of Merchant Shipping* (1969), p. 105.

¹¹² In so far as the rule in Article 56 (1) (a) is applicable, the onus of proof falls on Senegal.

¹¹³ D. W. Bowett, *The Law of International Institutions* (4th edn., 1982), p. 391; G. Tunkin, *Theory of International Law* (1974), p. 349; contra N. Feinberg, 'Unilateral Withdrawal from an International Organization', this *Year Book*, 39 (1963), p. 215; M. Akehurst, 'Withdrawal from International Organizations', *Current Legal Problems*, 32 (1979), p. 143.

has observed that the intention of the parties to admit the possibility of withdrawal could be indicated by an interpretative declaration, such as the declaration of San Francisco at the establishment of the UN.¹¹⁴

State practice on the point is limited and inconsistent. It affords no satisfactory basis for the elaboration of a general rule other than as an empirical observation of averages. When the draftsmen of constitutions have chosen to say nothing on the question of withdrawal, their silence has more frequently been explained by a desire to discourage unilateral denunciation than by a determination to exclude the possibility. The practice followed in the case of one treaty is, however, a most imperfect guide to the intentions of the parties to another. Experience within the World Health Organization¹¹⁵ and UNESCO¹¹⁶ suggests that in the absence of an express provision governing withdrawal, communications purporting to denounce the constitutions were ineffective. In the case of the UN the evidence is even more uncertain. Indonesia's announcement of its withdrawal from the organization in 1965 elicited expressions of disquiet from Italy and the UK, although both of the latter appear to have recognized the efficacy of the Indonesian action.¹¹⁷ On the other hand, Indonesia was later permitted to resume its seat without formal process of admission, which suggests that the withdrawal was ineffective.¹¹⁸

In the case of the European Communities, the *Landsstyre* of Greenland took the view that Denmark was entitled, by an 'analogous' application of the principles under Article 56 of the Vienna Convention of 1969, to denounce Greenland's membership unilaterally.¹¹⁹ It is not easy to comprehend the legal basis for this view. An advocate of the *Landsstyre's* case

¹¹⁴ H. Schermers, *International Institutional Law* (1980), p. 107. That declaration read in part as follows: 'If a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its co-operation in the Organization': L. Goodrich, E. Hambro and A. Simmons, *The Charter of the United Nations* (1969), pp. 74-6. Similarly, the conference establishing the WHO recorded that 'A Member is not bound to remain in the Organization, if its rights and obligations as such are changed by an amendment of the Constitution in which it has not concurred and which it finds itself unable to accept': *Proceedings of the International Health Conference* (1946) (*WHO Official Records*, No. 2), pp. 26 and 74, cited by Schermers, *op. cit.* above, at p. 64.

¹¹⁵ In 1949 and 1950 all the States in the Soviet bloc, together with China, announced their withdrawal from the WHO. In 1952 the (Nationalist) Chinese Government announced that it was to resume active participation in the organization. In 1957 the Soviet bloc States did likewise. They were permitted to resume activity within the WHO without formal readmission and were required to pay part of their arrears of contributions. Although this sequence of events is made ambiguous by political compromise on the amount of the contributions, it suggests strongly that the 'withdrawal' was ineffective.

¹¹⁶ In 1952 and 1953, Czechoslovakia, Poland and Hungary purported to withdraw from UNESCO. In 1954 all three revoked their notices. All were permitted to resume activities within the organization without undergoing the formal process of admission and were required to pay a proportion of arrears of contributions. See Feinberg, *loc. cit.* above (p. 150 n. 113), at p. 209.

¹¹⁷ E. Schwelb, 'Withdrawal from the United Nations: the Indonesian Intermezzo', *American Journal of International Law*, 61 (1967), p. 661 at p. 667.

¹¹⁸ See Akehurst, *loc. cit.* above (p. 150 n. 113), at p. 149.

¹¹⁹ F. Harhoff, 'Greenland's Withdrawal from the European Communities', *Common Market Law Review*, 20 (1983), p. 13 at p. 30.

was bound to concede that 'the right of unilateral denunciation from the E.C. can hardly be implied from the nature of the E.C. Treaties'.¹²⁰ It would be a formidable task to establish that the parties to the Treaty of Accession¹²¹ intended to admit the possibility of the denunciation or withdrawal of a party, still less to allow part of a party to withdraw. In the event, the *Landsstyre's* assertion was not put to the test, for the matter was regulated by consent.¹²²

(e) *Procedure*

Article 56 (2) of the Vienna Convention of 1969 requires a party to give not less than twelve months' notice of intention to denounce or withdraw from a treaty under the preceding paragraph. There can be no basis for contending that this represents customary law¹²³ although it can be argued that general international law requires a denouncing State to give reasonable notice.

The International Court adverted to this point in its judgment on the admissibility of the Nicaraguan application against the US. The US contended that on 6 April 1984 it had modified its declaration of acceptance of the compulsory jurisdiction of the Court and had thereby debarred Nicaragua from instituting proceedings against the US three days later. She advanced this argument despite the fact that the declaration of 1946 accepting the Court's jurisdiction was expressed to remain in force 'until the expiration of six months after notice may be given to terminate this declaration'. Part of the American argument was that Nicaragua had not accepted a reciprocal obligation: the US was free to terminate its declaration in relation to Nicaragua on the terms on which Nicaragua was free to terminate its own declaration. The Court dismissed the argument, as follows:

... the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.¹²⁴

¹²⁰ F. Harhoff, 'Greenland's Withdrawal from the European Communities', *Common Market Law Review*, 20 (1983), p. 13 at p. 29.

¹²¹ Brussels, 22 January 1972, Cmnd. 5179.

¹²² The Greek withdrawal from the Council of Europe and its subsequent readmission may be contrasted with the examples given in this passage. Article 7 of the Statute of the Council of Europe provides expressly for withdrawal: London, 25 May 1949, *United Nations Treaty Series*, vol. 87, p. 103. The readmission of Greece was accomplished with due formality and, of course, without liability to arrears of contribution. See A. Manin, 'La Grèce et le Conseil de l'Europe', *Annuaire français de droit international*, 20 (1974), p. 875.

¹²³ Where express provision is made for withdrawal, the period and the form of notice are commonly determined in the treaty. Thus in the case of the General Agreement on Tariffs and Trade, Geneva, 30 October 1947, *United Nations Treaty Series*, vol. 55, p. 194, denunciation is effective six months after receipt of written notice.

¹²⁴ *ICJ Reports*, 1984, p. 392 at p. 420.

Since Nicaragua had not manifested any intention to withdraw its own declaration, it was not necessary for the Court to define a reasonable time, but on any construction, from 6 to 9 April was not 'reasonable'.

V. CONCLUSION OF LATER TREATIES

Article 59 (1) of the Vienna Convention of 1969 provides that:

A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

- (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
- (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

The wording of the article is based on a passage in Judge Anzilotti's separate opinion in the case concerning the *Electricity Company of Sofia and Bulgaria (Preliminary Objection)*.¹²⁵ That passage reads as follows:

... it is generally agreed that, beside express abrogation, there is also tacit abrogation resulting from the fact that the new provisions are incompatible with the previous provisions, or that the whole matter which formed the subject of these latter is henceforward governed by the new provisions.

(a) *Wholesale Objections to Article 59 (1)*

Article 59 (1) of the Vienna Convention of 1969 is open to a fundamental objection. The conclusion of a later treaty either is or is not clear evidence of the parties' consent to modify the earlier treaty. If it is clear, the rule in Article 59 (1) is otiose. The matter is regulated by Article 54 (b) which provides that the termination of a treaty may take place at any time by the consent of the parties. If it is not clear, the problem is one of interpretation. The application of the rules governing interpretation should resolve the question whether the parties to the later treaty consented to the abandonment of their rights under the antecedent agreement.

This point was not lost in the International Law Commission, which appears to have decided to devote a separate article to the succession of treaty obligations only because this is a special case of termination by consent, for which it is desirable to give more detailed guidance than is supplied by Article 54.¹²⁶ In its report to the General Assembly the Commission emphasized the consensual basis of the rule in Article 59 (1), although in a different context. The Commission there found it necessary to explain the relationship between the present Article 59 and Article 30 (headed 'Application of successive treaties relating to the same subject-matter'). It stated that Article 30 deals with the priority of inconsistent

¹²⁵ *PCIJ*, Series A/B, No. 77 (1939), at p. 92.

¹²⁶ *Yearbook of the ILC*, 1963, vol. 1, pp. 114-19.

obligations of treaties, both of which are considered as in force and in operation: 'That Article does not apply to cases where it is clear that the parties *intended* the earlier treaty to be abrogated.'¹²⁷

Once it is accepted that the rule in Article 59 (1) is merely a special case of the rule in Article 54, the fundamental objection to its enunciation must disperse.

(b) *The Two Subparagraphs of Article 59 (1)*

There is a separate criticism to be made of the drafting of Article 59 (1), reflecting the objection already advanced against the drafting of Article 56. Subparagraphs (a) and (b) are phrased as alternatives: the second of them is not expressed merely as a special case of the first. We are invited to deduce from the incompatibility of two treaties that the later one repeals the former; and this without reference to the parties' intentions. The elaboration of the rule into two subparagraphs appears to owe its origins to the language of Judge Anzilotti¹²⁸ but it is plain from the context that he was not seeking to establish two alternative bases for terminating a treaty, but was giving two instances of a single phenomenon: tacit abrogation.

The tacit element is the expression of the parties' consent. Where two treaties between the same parties are so far incompatible that they cannot be applied at the same time, the conclusion of the later treaty will normally establish that the parties intended that the matter should be governed by that treaty. Where, however, there is no room for such an inference, and no assistance can be gained from the general rule of interpretation, the result is 'manifestly absurd or unreasonable' and the problem must be resolved by recourse to supplementary means of interpretation.¹²⁹ Only in the most exceptional of cases, when all these means have failed, does it appear necessary to rely upon the second subparagraph of Article 59 (1) to the exclusion of the first.

(c) *The Burgoa Case*

The compatibility of the London Fisheries Convention of 1964¹³⁰ with an informal agreement of 1978 between Spain and the European Economic Community was the subject of detailed submissions to the Court of Justice of the European Communities in Case 812/79, *Attorney-General v. Burgoa*.¹³¹ Juan Burgoa, a Spanish national and master of a Spanish fishing vessel, was charged in the Circuit Court of Cork with illegal fishing at a point 20 miles off the Irish coast. He contended that he was entitled to fish there in accordance with the Convention of 1964. Article 3 of that Convention provided that within the belt between 6 and 12 miles measured from the baseline of the territorial sea, the right to fish may be exercised

¹²⁷ *Yearbook of the ILC*, 1966, vol. 2, p. 253.

¹²⁹ Vienna Convention of 1969, Article 32 (b).

¹³⁰ 9 March 1964, *United Nations Treaty Series*, vol. 581, p. 57.

¹³¹ [1980] ECR 2787.

¹²⁸ Above, text at p. 153 n. 126.

by fishing vessels of other Contracting Parties which had habitually fished in that belt in the ten years expiring at the end of 1962. Burgoa submitted that this article was framed on the understanding, current in 1964, that a coastal State could not claim an exclusive fishing zone extending more than 12 miles from the coastline. From this he inferred that the Convention recognized the right of traditional fishermen from other Contracting States to fish within the band in which other such States claim jurisdiction, extending from the outer limit of territorial waters to the outer limit of the fisheries zone.

The European Court took care to avoid expressing a view on the merits of this argument (such as they were).¹³² The Court concluded that:

... the interim regime which the Community set up under its own rules falls within the framework of the relations established between the Community and Spain ... Those relations were superimposed on the regime which previously applied in those zones in order to take account of the general development of international law in the field of fishing on the high seas.

As is so often the case with the European Court, its language at this point is ambiguous, apparently drawing together in a single text two distinct arguments favoured by different members of the Court. The final phrase, referring to the general development of international law in the field of fishing, reflects the argument that the London Fisheries Convention was no longer in force, since the extension of fisheries jurisdiction from 12 to 200 miles radically transformed the obligations of the parties. The argument that the Convention was terminated was advanced not on the basis of desuetude but on the principle *rebus sic stantibus*. Indeed, Professor Schermers contends that the London Fisheries Convention is one of the rare examples where the rules in Article 62 (1) of the Vienna Convention of 1969 have been fulfilled.¹³³ Nevertheless, the *Burgoa* case appears to be inappropriate for the application of the principle in Article 62 (1). No party to the London Fisheries Convention claimed to terminate or withdraw from it, and even a fundamental change of circumstances does not terminate a treaty but affords a ground for termination by a party. To this objection it might be added that the procedural complement was lacking.¹³⁴

¹³² The submission was opposed by the Governments of Ireland, France and the UK and by the Commission. If accepted, it would appear to follow that traditional fishing rights, formerly exercised within a band of water 6 miles wide, could now be exercised within a band 188 miles wide. It is not easy to interpret Article 3 of the 1964 Convention in that sense, applying to the words of that article their ordinary meaning, in their context and in the light of the objects and purpose of that convention. See opinion of Mr Advocate General Capotorti, [1980] ECR at p. 2818.

¹³³ Note on *Attorney-General v. Burgoa*, *Common Market Law Review*, 18 (1981), p. 227 at p. 230. Article 62 (1) of the Vienna Convention of 1969 reads as follows: 'A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty.'

¹³⁴ See *Fisheries Jurisdiction case (UK v. Iceland)*, *ICJ Reports*, 1973, p. 1 at p. 21.

If we leave aside the final phrase in the passage from the Court's judgment, we find an alternative explanation of the inoperability of the London Fisheries Convention: the arrangements subsequently concluded between the Community and Spain superseded that Convention. The Court recorded that it had been informed by the Commission that the Spanish authorities co-operated with the Commission in order to ensure the implementation of the interim fishing regime which Mr Burgoa had transgressed. In particular the Spaniards co-operated in organizing the issuance of licences.¹³⁵ From this we may infer that the suspension¹³⁶ of a formal treaty may be brought about by an informal agreement between some of the parties. There seems no reason to apply a different rule in respect of the termination of a formal treaty by an informal agreement between all of the parties.¹³⁷ This inference is consistent with the conclusion reached by the International Law Commission, in a different context, that an agreement terminating a treaty need not be cast in the same form as the treaty which is to be terminated.¹³⁸ The States concerned are always free to choose the form in which they will conclude an agreement to suspend or terminate an antecedent treaty.

(d) *The Limits of Article 59*

It is possible to imagine circumstances in which the parties to a later treaty intend to terminate an earlier treaty without, however, manifesting that intention by either of the two means specified in Article 59 (1). The Constitution of the International Refugee Organization¹³⁹ contained no expiry clause and has not been denounced formally; but it appears to have been superseded by the Geneva Convention and the New York Protocol on the Status of Refugees.¹⁴⁰ It seems doubtful, however, that the termination of the Constitution of the International Refugee Organization can be inferred from the tests applied in Article 59 of the Vienna Convention. The US was a party to that Constitution and is a party to the New York Protocol but not to the Geneva Convention on the Status of Refugees. Guatemala, Venezuela and Taiwan were members of the IRO but are parties to neither the Geneva Convention nor the New York Protocol. Furthermore, there are several international agencies currently charged with responsibility for refugees, of which the Office of the UN High Commissioner, the UN Relief and Works Agency and the International Committee for Migration are but three. This being the case, it

¹³⁵ [1980] ECR at p. 2807.

¹³⁶ In the *Burgoa* case, the point at issue can only have been one of suspension of the operation of the London Fisheries Convention, since Austria, Portugal and Sweden were parties to that convention but not parties to the arrangements made between the Community and Spain.

¹³⁷ This is so, it is submitted, despite the fact that Article 58 of the Vienna Convention of 1969 speaks of suspension by an 'agreement' whereas Article 59 speaks of termination by a 'treaty'.

¹³⁸ *Yearbook of the ILC*, 1966, vol. 1, at p. 249.

¹³⁹ 15 December 1946, *United Nations Treaty Series*, vol. 18, p. 53.

¹⁴⁰ 28 July 1951, *ibid.*, vol. 189, p. 150; 31 January 1967, *ibid.*, vol. 606, p. 267.

cannot be maintained that the Constitution of the IRO is incapable of being applied at the same time as the Geneva Convention, nor even that the parties intended that the matters governed by that constitution should be governed exclusively by the Geneva Convention. The consent of the parties to the Constitution of the IRO to the termination of that agreement on the establishment of the UN Office of the High Commissioner can be detected from materials extraneous to the later treaty.¹⁴¹ If it were necessary to apply the provisions of the Vienna Convention of 1969 to this case, the appropriate Article would be 54, not 59.

VI. BREACH

The termination of a treaty may be brought about as an indirect consequence of the breach of one of its central terms; but, of course, such termination will by no means invariably ensue. Breaches of treaties are routine work for legal departments of foreign ministries,¹⁴² and the dissolution of the obligations of the defaulting State may be the very opposite of the result that the injured State wishes to achieve.¹⁴³ Nevertheless, it is obvious that States generally accept obligations under treaties only on the understanding that the other party or parties will observe corresponding obligations. One party's consent to be bound is conditional upon the other's compliance with the treaty. Hence there arises the principle *inadimplenti non est adimplendum*. In his dissenting opinion in the case of the *Diversion of Water from the Meuse*¹⁴⁴ Judge Anzilotti said of this principle that it is 'so just, so equitable, so universally recognised that it must be recognised in international relations'.

Article 60 of the Vienna Convention of 1969 provides (in part) that a material breach of a bilateral treaty entitles the other party to invoke the breach as a ground for terminating the treaty. In the case of multilateral treaties, a material breach by one of the parties entitles the other parties by unanimous agreement to terminate it, either in the relations between themselves and the defaulting State or as between all the parties.

(a) *Material Breaches*

Support may be found in the works of the classical writers including Grotius¹⁴⁵ and Vattel¹⁴⁶ for the proposition that a violation of any provision in a treaty entitles the injured party to repudiate the whole

¹⁴¹ See G. Scelle, 'Le Problème de l'apatride devant la Commission du droit international de l'O.N.U.', *Friedenswarte*, 52 (1953-4), p. 142 at p. 152.

¹⁴² S. Rosenne, *Breach of Treaty* (1985), at p. 7.

¹⁴³ This is particularly the case where the innocent State has a remedy in the law of State responsibility: see Simma, loc. cit. above (p. 133 n. 2), at p. 83.

¹⁴⁴ *PCIJ*, Series A/B, No. 70 (1937), at p. 50.

¹⁴⁵ H. Grotius, *De jure belli ac pacis*, Prologomena, para. 15.

¹⁴⁶ E. de Vattel, op. cit. above (p. 137 n. 32), Book II, section 202. See also R. Zouche, *Law between Nations* (trans. Brierly, 1911), vol. 2, p. 11; C. Wolff, *Jus gentium* (trans. Drake, 1934), vol. 2, pp. 225-6.

agreement. Their thesis was, however, developed at a time when the old conception of a treaty as a bargain or *Vertrag* was predominant and the dawn of the multilateral treaty had not yet arrived.¹⁴⁷ During the present century there has developed a formidable body of authority to support the proposition that a distinction is to be drawn between material and immaterial breaches of treaties, or breaches of material and immaterial provisions, the right of unilateral termination applying only to breaches of the former kind.

In the *Tacna-Arica* arbitration¹⁴⁸ it was argued on behalf of Peru that she was discharged from her obligation under the Treaty of Ancón¹⁴⁹ to hold a plebiscite in the disputed area, since Chile had acted in breach of the same treaty. The Arbitrator (Calvin Coolidge) considered it manifest that Peru would be relieved of her obligations only by breaches on the part of Chile such as would operate to frustrate the purpose of the agreement. This seems to suggest a distinction between ordinary breaches and those of sufficient magnitude to frustrate the agreement.

The point is made with characteristic brevity and simplicity in J. L. Brierly's *Law of Nations* (edited by Sir Humphrey Waldock):

From the time of Grotius, many writers have propounded the view that the breach of *any* term of a treaty by one party will release the other from all obligations under the treaty, but this doctrine, applied to any of the more important treaties, would lead to results so startling that it has never been adopted in international practice, and ought equally to be rejected by legal theory. There is an absence of decisive authority on the matter, but common sense seems to impose a distinction between terms that are material to the main object of the treaty and those which are not.¹⁵⁰

In support of this view, Brierly and Waldock relied upon the writing of W. E. Hall.¹⁵¹ Sir Hersch Lauterpacht relied on the same source in support of a similar conclusion, expressed in the eighth edition of Oppenheim's *International Law*,¹⁵² as did Crandall in the second edition of his treatise.¹⁵³ Wheaton¹⁵⁴ and Pitt Cobbett¹⁵⁵ reached that conclusion without placing reliance on Hall expressly. John Bassett Moore in 1906 used language having a distinctly modern ring. In his words, a treaty may be repudiated 'when either party refuses to perform a material stipulation'.¹⁵⁶ Although some of the more authoritative among the civilian writers persist in challenging the workability of a distinction between

¹⁴⁷ Lord McNair, 'The Functions and Differing Legal Character of Treaties', this *Year Book*, 11 (1930), p. 100 at p. 106.

¹⁴⁸ *Reports of International Arbitral Awards*, vol. 2, p. 920 at pp. 943-4 (1925).

¹⁴⁹ 20 October 1883.

¹⁵⁰ J. L. Brierly, *The Law of Nations* (6th edn., by Waldock, 1963), p. 327.

¹⁵¹ *International Law* (8th edn., by Pearce Higgins, 1924), p. 408.

¹⁵² Vol. 1 (8th edn., 1955), p. 947.

¹⁵³ S. B. Crandall, *Treaties: Their Making and Enforcement* (1916), p. 456.

¹⁵⁴ H. Wheaton, *Elements of International Law* (6th edn., by Berriedale-Keith, 1929), vol. 1, p. 515.

¹⁵⁵ *Leading Cases on International Law*, vol. 1 (4th edn., 1922), p. 340.

¹⁵⁶ *A Digest of International Law* (1906), vol. 5, p. 319.

material and immaterial breaches,¹⁵⁷ that distinction has now been dignified by its incorporation into Article 60 of the Vienna Convention of 1969. The International Court of Justice has said of that Article that

The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject. In the light of these rules, only a material breach of a treaty justifies termination.¹⁵⁸

It is necessary, therefore, to determine how that distinction is to be drawn. By Article 60 (3) of the Vienna Convention of 1969, a material breach of a treaty consists in a repudiation of the treaty not sanctioned by the Convention or the violation of a provision essential to the accomplishment of the object or purpose of the treaty. These words may be better understood if contrasted with the version proposed by Sir Gerald Fitzmaurice but discarded by Sir Humphrey Waldock and by the Commission. Sir Gerald, who may have been influenced in this respect by the contemporary English law of contract,¹⁵⁹ limited the right of renunciation to cases of 'fundamental breach', which he defined as a breach of the treaty 'in an essential respect, going to the root or foundation of the treaty relationship between the parties, and calling in question the continued value or possibility of that relationship'.¹⁶⁰ By contrast, Sir Humphrey Waldock's version defined a material breach by reference to the attitude adopted by the parties with regard to reservations, at the time when they concluded the treaty.¹⁶¹ Just as the permissibility of making reservations is determined by reference to the treaty's object and purpose when the text is silent on the point, so the permissibility of denouncing a convention in the event of breach is determined by reference to the same object and purpose.

It is essential to establish a degree of symmetry between the provisions governing reservations and those governing termination. The conditions under which a State may relieve itself of one obligation under a treaty, while remaining a party in all other respects, cannot be made less onerous in the case of that State's breach of the obligation than in the case of its making of a reservation at the time of acceptance of the treaty obligations. Moreover, the task of assessing the object and purpose of a treaty is closely related to that of ascertaining the parties' consent. In its advisory opinion

¹⁵⁷ C. Rousseau, *Droit International Public*, vol. 1 (1970), p. 214; see also I. Seidl-Hohenveldern, *Völkerrecht* (1975), p. 93; A. Verdross, *Völkerrecht* (1964), p. 178.

¹⁵⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ Reports, 1971, p. 1 at p. 47.

¹⁵⁹ In *Suisse Atlantique Société d'Armement Maritime SA v. Rotterdamsche Kolen Centrale NV*, [1957] 1 AC 361 at 397, Lord Reid observed: 'General use of the term "fundamental breach" is of recent origin and I can find nothing to indicate that it means more or less than the well-known type of breach which entitles the innocent party to treat it as repudiatory and to rescind the contract.' (See now *Chitty on Contracts* (25th edn., 1983), vol. 1, para. 1623, p. 894.) Sir Gerald Fitzmaurice's report was presented in 1957, the year of *Suisse Atlantique*.

¹⁶⁰ UN Doc. A/CN.4/107, *Yearbook of the ILC*, 1957, vol. 2, at p. 52.

¹⁶¹ UN Doc. A/CN.4/156, *ibid.*, 1963, vol. 2, at p. 76.

on *Reservations to the Convention on the Prevention and Punishment of Genocide*¹⁶² the International Court pointed out that

... it has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if, having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the facility to make reservations thereto.

Thus the parties' intentions with respect to the making of reservations were to be discovered by means of an analysis of the object and purpose of the treaty.

The reference to the repudiation of a treaty leads us even more immediately to the element of consent. Naturally, the defaulting State is not given an option to keep the treaty in force. As the International Court said in the *Namibia* case,¹⁶³ 'the consent of the wrongdoer to such a form of termination cannot be required'. The repudiation of the treaty, on the other hand, consists in action incompatible with its terms to such an extent that the defaulting party may be taken to have disowned or rejected it. (In the French version of the Vienna Convention of 1969, the word 'repudiation' is rendered by '*rejet*'.) Thus in the *Namibia* case the General Assembly, upheld by the Court, found that South Africa had disowned the Mandate, in the sense that its actions were inconsistent with its consent to the continuation of the obligations thereunder.¹⁶⁴ It was on this precise point that Judge Sir Gerald Fitzmaurice dissented, maintaining in this context that 'to deny the existence of an obligation is *ex hypothesi* not the same as to repudiate it'.¹⁶⁵

(b) *Procedural Rules*

One of the principal grounds upon which Judge Gros dissented in the *Namibia* case was the consideration that the termination of a treaty as a result of its breach requires the decision of an independent third party. In his words,

even if one concedes that the Mandate is a treaty, there is no rule in the law of treaties enabling one party at its discretion to put an end to a treaty in a case in which it alleges that the other party has committed a violation of the treaty.¹⁶⁶

¹⁶² *ICJ Reports*, 1951, p. 10 at p. 24.

¹⁶³ *Ibid.*, 1971, p. 1 at p. 49.

¹⁶⁴ *Ibid.* at p. 46.

¹⁶⁵ *Ibid.* at p. 300. It may be doubted, however, whether this unsupported assertion is correct. To repudiate is 'to reject as having no binding force on one' any obligation or 'to refuse to discharge or acknowledge' any objection: *Oxford English Dictionary*. 'Repudiation of a contract may mean that, having admittedly made a contract, you decide to break it and break it in such a way that you intend not to proceed with it. Another use of the term "repudiation" is where you say: "There never was a contract between us": *Toller v. Law Accident Insurance Ltd.*, [1936] 2 All ER 952 at 956, *per* Greene LJ.

¹⁶⁶ *ICJ Reports*, 1971, at p. 339.

It should be said at once that few jurists, if any, would challenge that statement as it is framed. The question is not whether a mere allegation of breach entitles a party to put an end to the treaty but whether the objective existence of a material breach entitles the innocent party to do so, even in the absence of impartial adjudication.¹⁶⁷

Article 60 (2) (a) of the Vienna Convention of 1969 provides that in the event of a material breach of a multilateral treaty by one of the parties, the other parties may by unanimous agreement terminate it. In every other case of material breach, that article speaks of the innocent party's right to invoke the breach as a ground for taking the action specified. Thus, by Article 60 (1), a material breach of a bilateral treaty entitles the innocent party to invoke the breach as a ground for terminating the treaty. The International Law Commission has explained that the formula 'invoke as a ground' is intended to emphasize that the right arising under the article is not a right arbitrarily to pronounce the treaty terminated. If the other party contests the breach or its character as a material breach, there will be a difference between the parties with regard to which there will apply the normal rules of international law governing the pacific settlement of disputes.¹⁶⁸

Among those rules of international law, however, is the principle whereby an injured State is entitled to take equivalent and proportionate counter-measures against a defaulting State so as to secure the observance by the latter of its obligations towards the former. In the case concerning the *Air Services Agreement*¹⁶⁹ the Tribunal observed:

If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through counter-measures.

Among the counter-measures that the US was entitled to take in that case was the suspension of the performance of its obligations under the agreement.

It is in the light of the principle applied in that case that we must understand the passage in the Court's advisory opinion on *Namibia* that was so trenchantly criticized by Professor Briggs in 1974. In that passage the Court referred to the 'general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person'. Professor Briggs observed that the Vienna Convention contains

¹⁶⁷ The error of reasoning here was repeated by counsel for India in the *ICAO Council* case, *ibid.*, 1972, p. 46. In reply Judge De Castro stated: 'The argument here set forth seems to be pervaded by what is a fairly common source of confusion namely the belief that the absence of any tribunal having compulsory jurisdiction arbitrarily leaves States free to terminate or suspend treaties. The true position is that a declaration of termination or suspension must be objectively justified to be valid': *ibid.* at p. 133.

¹⁶⁸ *Yearbook of the ILC*, 1966, vol. 2, at p. 254.

¹⁶⁹ 54 ILR 304 at 337 (1978).

its own procedures for settlement of disputes arising, *inter alia*, from claims of a unilateral right to terminate treaties and that

the elaborate care with which the International Law Commission and the Vienna Conference in their restatement of the law of treaties restricted any claim of a unilateral right by a State to terminate a treaty for breach to a right to invoke the breach as a ground for termination or suspension should have given pause to the Court, particularly before it indulged in *obiter dicta* and made indiscriminating generalisations not essential to the case before it.¹⁷⁰

Foremost among the provisions in the Vienna Convention of 1969 governing the procedures for settling disputes is Section 4, Articles 65–8. This Section provides *inter alia* that a party which invokes a ground for terminating a treaty or suspending its operation must notify the other party of its claim, indicating the measure proposed to be taken with respect to the treaty. If no party has raised any objection within a specified period, which should not normally be less than three months, the proposed measure may be taken. Professor Briggs's argument invites us to reach the conclusion that the only remedy available to the innocent party (assuming that the Vienna Convention of 1969 applies to the case) is to follow the procedure set out in Section 4.

This conclusion is, however, as unsupported by the text of the Vienna Convention of 1969 as it is by its *travaux préparatoires* and by the case law. Article 42 of the Convention provides that the validity of a treaty or the consent of a State to be bound by a treaty may be impeached only through the application of that Convention. Significantly, that article fails to say that the suspension of the operation of the Convention may be invoked only through the application of that Convention. In this respect, Article 42 is to be contrasted with Article 43, which deals with the relationship between general rules of international law and the Vienna Convention of 1969, as respects 'the invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation'.¹⁷¹ As we have seen¹⁷² the International Law Commission acknowledged in its report to the General Assembly that differences arising from allegations of material breaches are to be resolved in accordance with the normal rules of international law governing the settlement of disputes. They are not to be resolved exclusively by reference to the special rules in the Vienna Convention of 1969—at least where suspension is in issue. Professor Briggs's argument is incompatible with the unanimous award of the Tribunal in the *Air Services Agreement* case¹⁷³ and with the passage that he seeks to impugn in the *Namibia* case.¹⁷⁴ Nor is it supported by the Court's

¹⁷⁰ 'Unilateral Denunciation of Treaties: the Vienna Convention and the International Court of Justice', *American Journal of International Law*, 68 (1974), p. 51 at pp. 56–7.

¹⁷¹ Emphasis added.

¹⁷² Above, text at p. 161 n. 169.

¹⁷³ Above, p. 161 n. 169. M. Reuter's reservation with respect to countermeasures, at pp. 343–4, is immaterial to the point now made.

¹⁷⁴ *ICJ Reports*, 1971, at p. 34.

judgment in the *ICAO Council* case¹⁷⁵ in which it dismissed an Indian challenge to its jurisdiction on the ground that the dispute was not one concerning the Chicago Convention.¹⁷⁶ It was argued on behalf of India that the Chicago Convention was terminated or suspended by unilateral Indian action by reason of a material breach committed in 1971 by Pakistan. The Court rejected that argument on the ground that it must have *kompetenz-kompetenz*: the jurisdiction to determine whether a right to unilateral termination had arisen and had been validly exercised. The Court signally failed to rule that India has no right of unilateral suspension, as it might have done had Professor Briggs's argument been correct. It may be added, for good measure, that the right of unilateral suspension derives support from domestic judicial decisions, some of which go even further and support a right of unilateral denunciation in the event of material breach.¹⁷⁷

In this crucial respect (to which Professor Briggs's article has drawn attention) the Vienna Convention of 1969 is to be contrasted with the Havana Convention of 1928¹⁷⁸ and the Harvard Draft.¹⁷⁹ Neither of these distinguished between material and immaterial breaches or contemplated the discharge of a treaty in the event of a breach of the former kind. Article 16 of the Havana Convention provided instead that breaches of treaties should be sanctioned by decisions of courts of justice or of arbitral tribunals if diplomatic means should fail. Article 27 of the Harvard Draft made provision to similar effect.

These two instruments can be properly understood only if read in their historical context. The Havana Convention was contemporary with the Kellogg-Briand Pact¹⁸⁰ and the Harvard Draft was published as negotiations were concluding on the revision of the Statute of the Permanent Court of International Justice.¹⁸¹ In such an atmosphere, the draftsmen of these two instruments on treaties sought as a matter of policy to replace unilateral action by independent adjudication. No doubt the draftsmen's ambitions were reinforced by the Covenant of the League of Nations which contained more emphatic and general provisions for the settlement of disputes than are found in the UN Charter.¹⁸² The more modest regime established through the Vienna Convention of 1969, which permits unilateral suspension while prohibiting unilateral denunciation, is better suited to a consensual international order. Moreover, a right of unilateral

¹⁷⁵ Ibid., 1972, at p. 64.

¹⁷⁶ 7 December 1944, *United Nations Treaty Series*, vol. 15, p. 295.

¹⁷⁷ See in particular *Charlton v. Kelly, Sheriff of Hudson County, New Jersey*, 229 US 447 (1913); *In re Tatarko*, *Annual Digest*, 16 (1949), no. 110, p. 314.

¹⁷⁸ 20 February 1928, *American Journal of International Law*, 22 (1928), Supplement, p. 138.

¹⁷⁹ Loc. cit. above, p. 133 n. 2.

¹⁸⁰ Paris, 27 August 1928, Hudson, *International Legislation*, vol. 4 (1928-9), no. 206.

¹⁸¹ See J. G. Guerrero, 'Le Nouveau règlement de la C.P.J.I.', *Revue internationale française du droit des gens*, 1 (1963), p. 425; Manley O. Hudson, 'The 1936 Rules of the Permanent Court of International Justice', *American Journal of International Law*, 30 (1936), p. 463.

¹⁸² Rosenne, op. cit. above (p. 157 n. 142), at p. 9.

suspension can in many instances be inferred from the innocent party's expression of its consent to be bound by a treaty. Any other construction of the treaty would imply that the innocent party consented to forego its right to take proportionate counter-measures in the face of a material breach by its partner.

(c) *Humanitarian Treaties*

Paragraph 5 of Article 60 provides that a material breach by one of the parties to a treaty does not operate as a ground for termination or suspension of provisions relating to the protection of the human person contained in treaties of a humanitarian character, particularly those prohibiting any form of reprisal.¹⁸³ By contrast with most other international engagements, such treaties do not aspire to establish balanced and reciprocal advantages for the parties but to create common standards of treatment for individuals. Sir Gerald Fitzmaurice contended that breaches of law-making treaties generally should not give innocent parties the right to invoke the breach as a ground for terminating them or suspending them wholly or in part.¹⁸⁴ His argument commands respect, for in general the parties' consent to be bound by the terms of such treaties is not contingent upon the observance by other parties of their obligations. In this respect the principle embodied in paragraph 5 does not appear to go far enough.

From Sir Gerald's principle it must follow that a breach of a peremptory norm of general international law, embodied in a treaty, cannot be invoked by an innocent party as a ground for terminating or suspending the operation of the provision embodying that norm. This must be so, for by definition the obligation arises not under the treaty but *aliunde*; and if two parties cannot set aside that principle consensually, in their mutual relations, it must follow *a fortiori* that one party cannot set it aside unilaterally in its relations with another State that has failed to observe it.¹⁸⁵

(d) *Other Remedies for Breach*

What is conspicuously lacking in the Vienna Convention of 1969 is the formulation of precise rules on remedies.¹⁸⁶ In order to identify the

¹⁸³ Sinclair, *op. cit.* above (p. 134 n. 7), at p. 190, paraphrases para. 5, stating that it operates 'where the breach concerns provisions relating to the protection of the human person'. It is thought, however, that it is immaterial that the breach concerns such a provision. Para. 5 operates to prevent the suspension or termination of any such provision in response to any breach of the treaty, including breaches of provisions unrelated to the protection of the human person.

¹⁸⁴ '*Ex injuria non oritur jus*', *Recueil des cours*, 92 (1957-II), p. 117 at pp. 125-6.

¹⁸⁵ P. Reuter, *Introduction au droit des traités* (1972), at p. 188; Sinclair, *op. cit.* above (p. 134 n. 7), at p. 201.

¹⁸⁶ There is a brief reference in Article 65 (5) to a party 'claiming performance of the treaty', but as Arbitrator Lagergren observed in *BP v. Libya*, the Vienna Convention of 1969 falls short of providing that the innocent party is entitled to demand specific performance or *restitutio in integrum*: 53 ILR 297 at 333. The main procedural rule established in this context by the Vienna Convention of 1969 is that the parties shall seek a solution through the means indicated in Article 33 of the UN Charter (Article 65 (3)).

remedies available to the innocent party, besides the right to terminate or suspend the operation of the treaty, it is necessary to have recourse to general rules of international law, at least if the disputed treaty contains no provisions of its own respecting remedies.¹⁸⁷ Such rules will determine not only the form of remedy available but also the circumstances in which any party may complain of the breach.

In the Draft Articles on State responsibility prepared for the International Law Commission, Professor Riphagen proposed that a State party to a multilateral treaty would be considered as an 'injured State' in the event of a breach of an obligation under that treaty if any of four conditions were fulfilled:

- (i) the obligation was stipulated in its favour; or
- (ii) the breach of the obligation by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties; or
- (iii) the obligation was stipulated for the protection of the collective interests of the States parties; or
- (iv) the obligation was stipulated for the protection of individual persons, irrespective of their nationality.¹⁸⁸

His proposal is to be contrasted with Article 60 (2) (b) and (c) of the Vienna Convention of 1969, which enables a party to a multilateral treaty to invoke a breach of that treaty as a ground for suspending its operation only when that party is 'specially affected by the breach', or when the breach 'radically changes the position of every party with respect to further performance of its obligations'. There is much to be said in support of the principle that an innocent party should be in a position to obtain redress for breach of a provision in a multilateral treaty which would not be of such a nature as to warrant the suspension or termination of the treaty. Indeed, the innocent State's object in ratifying or acceding to the treaty will commonly be to secure the performance of its objects; and that is seldom achieved by resiliation.

In one respect it may be wondered whether Professor Riphagen's proposal goes far enough. May not a party have cause to rely on the law of State responsibility in the event of a breach of a multilateral treaty even in the absence of any of the four conditions set out in his report? It might be consonant with the objectives of a multilateral treaty governing the protection of endangered species of animals to permit any party, without qualification, to obtain declaratory relief against another party, in the event of the breach of its obligations.¹⁸⁹ The parties' consent to be bound

¹⁸⁷ Such was the case with the treaties in the *Portuguese Religious Properties* case (1920), *Reports of International Arbitral Awards*, vol. 1, p. 9, and with the *compromis* between the US and Cuba in the *Walter Fletcher Smith* claim (1929), *ibid.*, vol. 2, p. 913. See also the *Kelley* claim (1930), *ibid.*, vol. 4, p. 608.

¹⁸⁸ *Yearbook of the ILC*, 1984, vol. 2, p. 3.

¹⁸⁹ It would be otherwise where the innocent State seeks monetary compensation. One cannot apply indiscriminately the Permanent Court's statement in the *Chorzów Factory (Indemnity)* case, *PCIJ*, Series A, No. 17 (1928), 'that any breach of an engagement involves an obligation to make reparation'.

by such a treaty might well have been given precisely with the object of putting itself in a position to sanction breaches of any of its terms.

VII. CONCLUSION

The principle of consent runs as a single thread through the rules in the Vienna Convention of 1969 governing the termination of treaties. Consistent recourse to that principle will occasionally draw attention to problems of drafting in the Convention of 1969, and will commonly assist in resolving the difficulties and controversies that arise in this context. Indeed, this observation applies not only in the case of those provisions examined in the preceding pages but also in the case of others, which merit separate study.

In drafting the article governing the termination of treaties by reason of a fundamental change of circumstances¹⁹⁰ the International Law Commission explicitly rejected the theory whereby a tacit condition must be read into every treaty of unlimited duration that would dissolve it in the event of a fundamental change.¹⁹¹ Nevertheless, in the ensuing text, the circumstances susceptible of being the subject of a fundamental change are defined as those which constituted an essential basis of the parties' consent to be bound; and the International Court has put its *imprimatur* on this language, paraphrasing it thus:

International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty.¹⁹²

Indeed, consistent recourse to the principles of consent is likely to serve similar purposes in relation to the rules governing the invalidity of treaties as in relation to those governing their termination. In April 1986 the Praesidium of the Supreme Soviet of the USSR issued a decree announcing the Soviet Union's accession to the Vienna Convention of 1969, subject to certain reservations and a declaration.¹⁹³ One such reservation states that the USSR will not consider itself bound by Article 45 (b) of the Convention since it 'contradicts established international practice'. The efficacy of the reservation is not in question but the reason advanced by the Soviet Union appears to instil doubt on the issue whether Article 45 (b) reflects customary international law. That article provides that a State may no longer invoke a ground for invalidating a treaty, on grounds of manifest violation of a fundamental rule of internal law, or failure to observe a specific restriction on the representative's authority, or error, fraud or corruption, nor may it invoke a ground for terminating, withdrawing from

¹⁹⁰ Article 62.

¹⁹¹ *Yearbook of the ILC*, 1966, vol. 2, p. 258.

¹⁹² *Fisheries Jurisdiction case (UK v. Iceland)*, *ICJ Reports*, 1973, p. 1 at p. 21.

¹⁹³ *Vedomosti Verkhovnogo Sovieta SSR* No. 16 (2350), item 263 (4 April 1986).

or suspending the operation of a treaty on grounds of breach, supervening impossibility of performance or fundamental change of circumstances, if 'after becoming aware of the facts . . . it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be'.

If we leave aside the question whether the Vienna Convention represents customary international law in providing that a treaty may be invalidated, terminated or suspended on those grounds,¹⁹⁴ we may find in the principle of consent a guide to the nature of acquiescence. Paragraph (a) of Article 45 is the counterpart of paragraph (b): the former deals with express consent and the latter with tacit consent. In each of these paragraphs, the Vienna Convention of 1969 reflects the principle, supported by case law,¹⁹⁵ that

the State is not permitted to take up a legal position which is in contradiction with the position which its own previous conduct must have led the other parties to suppose that it had taken up with respect to the validity, maintenance in force or maintenance in operation of the treaty.¹⁹⁶

Far from being an innovation, Article 45 (b) embodies a principle allied to the maxim *qui tacet consentire videtur, si loqui potuisset ac debuisset*: conduct, including a failure to protest at another State's action, may in appropriate circumstances be construed as an expression of consent, by which a State is bound.

¹⁹⁴ As to these issues, see R. A. Mullerson, 'Implementation of International Treaties in National Law', *Soviet Year Book of International Law*, 1978, p. 125; O. I. Tiunov, 'Principle of Fulfilment in Good Faith of Treaty Obligations', *ibid.*, p. 101; T. Meron, 'Article 46 of the Vienna Convention on the Law of Treaties', *this Year Book*, 49 (1978), p. 175; A. Gomez Robledo, '*Clausula rebus sic stantibus*', *Estudios de Derecho Internacional: Homenaje al Professor Miaja de la Muela* (1979), p. 99; A. Triggiani, 'Denuncia dei trattati fondata sulla loro natura', *Comunicazione e Studi*, 15 (1978), p. 469; R. Kearney, 'Internal Limitations on External Commitments', *The International Lawyer*, 4 (1969), p. 1.

¹⁹⁵ *Arbitral Award by the King of Spain* case, *ICJ Reports*, 1960, p. 192, and *Temple of Preah Vihear* case, *ibid.*, 1962, p. 6. For the similarities and differences between estoppel and acquiescence in this context, see Sinclair, *op. cit.* above (p. 134 n. 7), at p. 168.

¹⁹⁶ *Yearbook of the ILC*, 1966, vol. 2, p. 239.

THE DRAFTING COMMITTEE OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: THE IMPLICATIONS OF MULTILINGUAL TEXTS*

By L. D. M. NELSON¹

I. INTRODUCTION

THE work of the Drafting Committee of the Third United Nations Conference on the Law of the Sea presents unique and interesting features of value to all international lawyers concerned with the codification and progressive development of international law and to all those whose business is to interpret the text of the UN Convention on the Law of the Sea (referred to hereafter as the Convention on the Law of the Sea). The Drafting Committee, as an integral part of the machinery of the Conference, was obliged to function within the political ambience of the Conference.² This fact shaped the Committee's procedure and largely determined the nature of its contribution to the work of the Conference. The results were unique. The Committee created a novel machinery for multilingual drafting, particularly the formation of language groups as its subsidiary organs, and in the process produced a considerable volume of documentation which should be considered as part of the *travaux préparatoires* of the UN Convention on the Law of the Sea and thus should help in its interpretation.

II. MEMBERSHIP

The Drafting Committee consisted of twenty-three members, including its Chairman.³ The membership of the Drafting Committee was in part

* © Dr L. D. M. Nelson, 1987.

¹ LL.M., Ph.D. (London); the author is a member of the United Nations Office for the Law of the Sea. The views expressed in this article are those of the author and do not necessarily reflect the views of the United Nations or the United Nations Office for the Law of the Sea.

² It is generally acknowledged that the Third UN Conference on the Law of the Sea was engaged in law-making with respect to issues the most important of which were of an essentially political nature. That was the reason in the first place that the item concerning the peaceful uses of the sea-bed beyond national jurisdiction was in fact entrusted to the First Committee: *General Assembly Official Records* (hereinafter *GAOR*), 22nd Session, A/BUR/SR.171 (1967). It was also owing to this factor that a proposal to have the legal issues in the item referred to the Sixth Committee was rejected in the General Committee: *ibid.*, 25th Session, General Committee, 188th meeting.

³ The members of the Drafting Committee were: Afghanistan, Argentina, Bangladesh, Ecuador, El Salvador, Ghana, India, Italy, Lesotho, Malaysia, Mauritania, Mauritius, Mexico, The Netherlands, Philippines, Roumania, Sierra Leone, Spain, Syrian Arab Republic, Union of Soviet Socialist Republics, United Republic of Tanzania and the USA. Thailand replaced Bangladesh and Austria replaced The Netherlands as members of the Drafting Committee on a rotating basis. Ambassador J. Alan Beesley of Canada was the Chairman of the Committee.

based on the principle of equitable geographical distribution and partly on the principle embodied in a formula which had been accepted by the Conference that no State should as of right be represented on more than one main organ of the Conference. As a result there were some significant omissions in the list of members. For instance, the People's Republic of China, France and the United Kingdom were not members of the Drafting Committee. The absence of such States reflected, it may be argued, a certain inadequacy in the membership of the Committee. It was this flaw, as it were, in the composition of the Drafting Committee which constituted the prime reason for the establishment of the language groups. These groups helped to provide the machinery of the Committee with more adequate representation.⁴

III. COMPETENCE

The function of the Committee was embodied in Rule 53 of the Rules of Procedure of the Conference which stated *inter alia*:

It shall, *without reopening substantive discussion on any matter*, formulate drafts and give advice on drafting as requested by the Conference or by a Main Committee, co-ordinate and refine the drafting of all texts referred to it, *without altering their substance*, and report to the Conference or to the Main Committee as appropriate. *It shall have no power of or responsibility for initiating texts.*⁵

This unusually restrictive provision on the competence of the Drafting Committee of the Third UN Conference on the Law of the Sea was the result of amendments to the draft rules of procedure which were submitted to and discussed at the second session of the Conference. The draft rules of procedure submitted by the Secretariat⁶ had declared, *inter alia*, that the Drafting Committee 'shall prepare drafts and give advice on drafting as requested by the Conference or by a Main Committee, co-ordinate and review the drafting of all texts referred to it, and report to the Conference or to the Main Committee as appropriate'. This was in keeping with the usual formula used to describe the competence of drafting committees in major international lawmaking conferences.⁷

⁴ On this point it is useful to note these observations made to the Sixth Committee of the General Assembly in the 1983 Report of its Working Group on the Review of the Treaty-making Process: 'With respect to the composition of drafting committees, the main objective is to ensure adequate representation of all the languages in which a treaty is to be concluded, as well as give due regard to the principal legal systems of the potential parties. However, there may be certain obstacles to such ideal distribution due to the constraints of geographical and political distribution, to inhibitions against States serving both on the general committee and the drafting committee of a conference, and to the desirability of restricting the size of drafting committees': A/C.6/38/L.28 (1983).

⁵ Emphasis added.

⁶ A/CONF.62/L.1 (1974), *Third UN Conference on the Law of the Sea, Official Records* (referred to hereinafter as *Off. Rec.*), vol. 3.

⁷ See, for instance, Rule 48 of the Rules of Procedure of both the UN Conference on the Law of Treaties and the UN Conference on the Representation of States in their Relations with International Organizations, and Rule 47 of the Rules of Procedure of the UN Conference on Succession of States in respect of Treaties. For amendments, see A/CONF.62/4 submitted by the United Republic of

The intent of the amendments to the draft rules of procedure was to make it quite clear that the Drafting Committee should not be a forum for negotiations, thus ensuring that small groups would not be empowered to make any major decisions affecting the Conference.⁸ This concern about the role and power of small groups was almost a *leitmotif* of the Conference itself which to a certain extent shaped its negotiating machinery.⁹

IV. *MODUS OPERANDI* OF THE DRAFTING COMMITTEE

At the seventh session of the Conference the Drafting Committee was requested to commence work by addressing itself to the provisions of the Informal Composite Negotiating Text (ICNT)¹⁰ which appeared to be settled, and to recommend changes which were considered necessary from a technical and drafting point of view, particularly the adoption of uniform terminology.¹¹

There were attempts to have the Drafting Committee begin its work earlier but they were unsuccessful.¹² A proposal to have the Chairman of the Drafting Committee prepare a draft text for the preamble and final clauses also failed for lack of support.¹³ In retrospect, given the immense task before it, the Committee should have been authorized to commence its work earlier. However, the politics of the Conference determined the date on which the Drafting Committee became involved with the work of the Conference. In keeping with the notion of the package deal, political compromises had to be worked out before the submission of any text to that Committee.

The procedure adopted by the Drafting Committee for carrying out its task was novel. The Committee operated on three levels. On the first level there were the language groups of the Drafting Committee representing the six languages of the Conference: Arabic, Chinese, English, French, Russian and Spanish.¹⁴ The language groups were open to all delegations whether members of the Drafting Committee or not. They were established almost as soon as the Drafting Committee began its work.¹⁵ On the second level there were the co-ordinators of the six language groups who met

Cameroon, Chile, Colombia, Kenya, Mexico and the United Republic of Tanzania, and the sub-amendment to this document submitted by Pakistan. Both documents are incorporated in A/CONF.62/L.1 (1974), *Off. Rec.*, vol. 3.

⁸ To this effect see, in particular, observations by Tanzania, 8th plenary meeting, para. 13, *Off. Rec.*, vol. 1.

⁹ See General Committee (10th meeting), para. 39, *Off. Rec.*, vol. 4; 128th plenary meeting, para. 92, *Off. Rec.*, vol. 13; 136th plenary meeting, para. 86, *Off. Rec.*, vol. 14.

¹⁰ A/CONF.62/WP.10 (1977), *Off. Rec.*, vol. 8.

¹¹ 93rd plenary meeting, para. 7, *Off. Rec.*, vol. 9.

¹² General Committee (14th meeting), paras. 23 and 50, *Off. Rec.*, vol. 5.

¹³ 70th plenary meeting, paras. 1 and 8, *Off. Rec.*, vol. 5.

¹⁴ See Rule 56 of the Rules of Procedure of the Conference.

¹⁵ See the Report of the Chairman of the Drafting Committee to the resumed seventh session: 108th plenary meeting, para. 56, *Off. Rec.*, vol. 9. Note Rule 50 of the Rules of Procedure of the Conference which empowered the Conference and each Committee to establish subsidiary organs. Further see pp. 173-4 below.

under the direction of the Chairman of the Drafting Committee.¹⁶ At first the co-ordinators met privately but from the informal intersessional meeting of the Drafting Committee held in New York from 12 January to 27 February 1981 onwards, their meetings were open to all members of the Drafting Committee and all members of the language groups.¹⁷ This meant that these meetings were in effect open to all delegations attending the Conference. Finally, on the third level was the Drafting Committee itself.

The work of the Drafting Committee commenced at the level of the language groups. Each language group discussed drafting proposals coming from members of that language group, from other language groups¹⁸ and, in some cases, from the Secretariat.¹⁹ On the basis of these discussions it submitted its suggestions for drafting changes. These suggestions were considered at meetings of the co-ordinators of the language groups. On the basis of their deliberations, the co-ordinators of the language groups in turn submitted proposals for changes to the text²⁰ to the Drafting Committee. After examining these proposals the Drafting Committee then submitted its recommendations to the Conference. The Drafting Committee, like the Conference itself, operated at all levels on the basis of consensus.

V. SOME OBSERVATIONS ON THE PROCEDURE ADOPTED BY THE DRAFTING COMMITTEE

There are two aspects of the Drafting Committee's procedure which deserve comment. The first concerns the multilingual aspect of the process and the second relates to the issue of consensus.

The multilingual aspect of the work of the Drafting Committee cannot be over-emphasized. Each language group proposal was translated into the other five languages of the Conference before submission to the meetings of the co-ordinators of the language groups.²¹ This applied even to those proposals which envisaged stylistic or grammatical changes applicable to only one language. The issue of translating such proposals into the

¹⁶ The co-ordinators of the language groups also acted as the bureau of the Committee, being responsible for organizing its work.

¹⁷ See A/CONF.62/L.67/Rev. 1 (1981), para. 2, *Off. Rec.*, vol. 15.

¹⁸ The proposals coming from the language groups carried the following symbols: ALGDC (Arabic Language Group); CLGDC (Chinese Language Group); ELGDC (English Language Group); FLGDC (French Language Group); RLGDC (Russian Language Group); SLGDC (Spanish Language Group).

¹⁹ The suggestions for drafting changes coming from the Secretariat were submitted as Informal Papers.

²⁰ The proposals of the co-ordinators formed the CG/WP series.

²¹ They were referred to as DC Papers. For example, the suggestions of the language groups on Article 40 of the Convention carried the symbol DC/Part III/Article 40. The language of the first entry indicated from which language group it emanated. The remaining entries were in English alphabetical order of the languages.

other language versions constituted a continuing problem for the Drafting Committee and its subsidiary organs. On the one hand it was technically quite difficult, if not impossible, to translate a proposal which was not intended to affect other language versions of the text. Yet, on the other hand, since all the languages of the Convention were equally authentic,²² the documentation was necessary to ensure that what was submitted as a stylistic or grammatical change was in fact what it purported to be. The atmosphere of suspicion which at times pervaded the Conference itself merely exacerbated the issue. The Drafting Committee did not find a completely adequate answer to this problem²³—a problem which is of general significance for any real multilingual drafting exercise.

This multilingual procedure resulted in a complex and voluminous mass of documentation which dealt with almost every article of the Convention. It was precisely when the co-ordinators were considering the proposals coming from each language group that the Drafting Committee was engaged in truly multilingual drafting.

The transactions of the Drafting Committee and its subsidiary organs were governed by the consensus rule. This was of course the guiding spirit of the Conference itself. It would have been surprising and perhaps unwise had the Drafting Committee adopted a different decision-making procedure. The notion of consensus and the already restricted nature of the Committee's mandate²⁴ had the cumulative effect of making it quite difficult at times to introduce changes in the various language versions of the text. The scope of the Committee's mandate was interpreted quite rigorously by certain members of the Drafting Committee,²⁵ and this attitude may have prevented the adoption of proposals which would have improved the text.²⁶ However, it did not prohibit, and indeed could not have prohibited, the *submission* of such proposals which now form part of the documentation of the Drafting Committee and constitute, in this writer's opinion, a significant portion of the records of the Conference.²⁷

VI. THE LANGUAGE GROUPS

The use of language groups by the Drafting Committee is a unique and particularly significant feature. They served an important technical function in that their existence enabled all language versions of the text²⁸ to

²² See Article 320.

²³ The role of the language experts of the Secretariat should be noted in this connection. They played an important role in the language groups and in a sense provided a partial solution to this problem.

²⁴ See pp. 170–1 above.

²⁵ On this see Bernard H. Oxman, 'The Third United Nations Conference on the Law of the Sea', *American Journal of International Law*, 76 (1982), pp. 1–23.

²⁶ See pp. 175 ff. below. Further see Oxman, loc. cit. (previous note).

²⁷ Further see pp. 190–2 below.

²⁸ On this point see A/CONF.62/L.67 (1981), where the Arabic Language Group declared that '... in view of the fact that no Arabic translation of the law of the sea conventions has previously been made, the group felt that part of its programme of work should be devoted to a meticulous examination

be examined more closely than would otherwise have been the case and in many cases by those who participated in the negotiations.²⁹

The following is a recommendation of the Arabic Language Group illustrating an example of the type of work the language groups were engaged in. It was observed that

Le Groupe linguistique arabe a examiné les articles de la Convention dans lesquels figure, en anglais, l'expression 'legal status' et étudié l'emploi des termes correspondants à cette expression dans le texte arabe ainsi que dans les autres langues. Compte tenu de cet examen, il demande au Comité de rédaction d'approuver l'emploi, dans le texte arabe, des mots 'condition', 'régime', 'statut' comme indiqué ci-après:

'régime' — dans les articles 2, 34, 49, 55, 78, 121, 137, 155 (2) et 259;³⁰

'condition' — dans l'article 92;

'statut' — dans l'article 176, ainsi que dans l'article 13 de l'annexe IV.

Ainsi, le mot 'régime' serait employé lorsqu'il s'agit des eaux, des îles, des installations, etc., le mot 'condition' lorsqu'il s'agit de navires et le mot 'statut' lorsqu'il s'agit d'institutions. Il convient de noter que ces trois termes sont déjà employés de cette façon dans le texte français, et dans le même ordre.³¹

It can be argued that this kind of exercise could not have taken place or even been contemplated were the language groups not in existence.

Each language group not only examined the text in its own language and submitted proposals on that text, but also examined proposals for changes in other language texts in order to achieve concordance among the various texts.³² The interaction between the language groups and the co-ordinators of the language groups was also of great value in ensuring the concordance of the six texts.

The language groups also served a political function. The fact that these groups were open to all delegations allowed all delegations to participate in the work of the Drafting Committee. Thus, in practice, the Drafting Committee was not a small group making decisions affecting the majority of delegations without their participation.³³ It should also be added that

of the Arabic text in order to bring it to the highest level of accuracy . . .': Annex, *Off. Rec.*, vol. 15. In addition, note this observation of the Chinese Language Group: 'The Chinese Language Group has resolved a number of problems relating to Chinese terminology and phrases using the English text as its principal reference' (LGDC/1. Add. 4)—an informal paper submitted to the Drafting Committee in 1979.

²⁹ See p. 198 below.

³⁰ Article 60, para. 8, was later added to this category.

³¹ DC/Recommendation/1, 23 July 1982. The French translation of this proposal is used since the proposal itself is based on usage in the French text. The question of the distinction in the English text between the words 'status' and 'regime' and the problem of concordance in the use of these terms among the different languages had been raised in an early report of the Drafting Committee. See A/CONF.62/L.40 (1979), section XXV, *Off. Rec.*, vol. 12.

³² The Drafting Committee had at its disposal a multilingual text (A/CONF.62/DC/WP.1 and revisions) which considerably aided the Committee in this task. This text was updated on three occasions. The last text embodied the Draft Convention (Informal Text) (A/CONF.62/WP.10/Rev. 3).

³³ See p. 171 above.

the fact that the language groups were open to all delegations facilitated the adoption of the recommendations of the Drafting Committee by the Conference.

VII. THE WORK OF THE DRAFTING COMMITTEE

The work of the Drafting Committee can be divided into two parts: first, the process of harmonization of words and expressions in the text as a whole³⁴ and second, the article-by-article review of the provisions of the Draft Convention.

The Drafting Committee began the harmonization exercise by seeking to ensure consistency in terminology with respect to certain internal references in the text.³⁵ The rationale behind this exercise was the need for economy and brevity given the considerable length of the text of the Convention. For instance, the Committee decided that in the English text the formula 'this Convention' should be used in contradistinction to 'the present Convention' when reference was made to the Convention on the Law of the Sea in the text.³⁶

There was one such reference on which agreement was reached almost at the end of the Conference. This concerned the annexes. It was then agreed that references in the body of the Convention to an article in an annex should read, for example, as follows: 'in accordance with Annex VII, Article 2'; that references within an annex to an article of the Convention should read, for example, as follows: 'in accordance with Article 160'; that references within an annex to an article of the same annex should read, for example, as follows: 'in accordance with Article 2 of this Annex'; and that references within an annex to another annex should read, for example, as follows: 'in accordance with Annex VI, Article 4'. It is difficult to conceive the reason for the long debate on this matter, since the relationship of the annexes to the Convention had already been dealt with in Article 318.³⁷

The Committee then directed its attention to the harmonization of words and expressions in the text taken as a whole, in each of the authentic languages. By way of illustration, a few instances of the operation of this process can be cited. Various expressions were used in the English text to refer to the duty of States to take certain measures on the national plane to implement international obligations, e.g. 'make laws and regulations', 'take the necessary legislative measures', 'establish national laws and

³⁴ This harmonization exercise was based primarily on Informal Paper 1/Rev. 1, Informal Paper 2 and Informal Paper 2/Add. 1—mimeographed. These papers were prepared by the Secretariat.

³⁵ Based on Informal Paper 1/Rev. 1/Add. 1—mimeographed. See 106th plenary meeting, para. 61, *Off. Rec.*, vol. 9.

³⁶ Note also its decision to delete 'of the present Convention' when reference was made to an article of the Convention on the Law of the Sea.

³⁷ This article stated that 'The Annexes form an integral part of the Convention and, unless expressly provided otherwise, a reference to this Convention or to one of its Parts includes a reference to the Annexes relating thereto.'

regulations', and so on. The Drafting Committee recommended that the verb 'adopt' should be employed with respect to 'laws' and 'laws and regulations' or 'laws or regulations', and that the verb 'take' should be employed with respect to 'measures'.³⁸

The text was also not consistent in its use of the phrase 'developing country' or 'developing State'. The Drafting Committee recommended that the phrase 'developing State' should replace 'developing country'.³⁹ It should be noted that during the article-by-article review of the text, the application of this recommendation to Article 150, subparagraph (h), and Article 151, paragraph 10, was raised and no agreement could be reached on its implementation. Thus, in the English text of the Convention, both Article 150, subparagraph (h), and Article 151, paragraph 10, refer to 'developing countries' and not 'developing States'.⁴⁰ It was presumably thought that the expression 'developing country' widened the scope *ratione personae* of the application of these provisions on the protection of developing land-based producers likely to be adversely affected by seabed mining.⁴¹

Another case in point arose with the use of expressions such as 'the preservation of the marine environment', 'the protection of the marine environment' and 'the protection and preservation of the marine environment'. Guided by the general obligation imposed on States by Article 192 of the Draft Convention,⁴² the Drafting Committee recommended that the phrase 'the protection and preservation of the marine environment' should be the preferred terminology⁴³ throughout the text with the exception of Part XI.⁴⁴ The reluctance to apply this recommendation to the relevant provisions in Part XI could conceivably have substantive implications with respect to the standards of environmental protection required in the case of deep sea-bed mining operations. Perhaps this was precisely the reason for its non-application.

Certain harmonization issues did arise which were not resolved at this stage of the Drafting Committee's work. The use of the expressions 'States with special geographical characteristics' in certain provisions of

³⁸ A/CONF.62/L.57/Rev. 1 (1980), section III, *Off. Rec.*, vol. 14.

³⁹ See A/CONF.62/L.40 (1979), section II, *Off. Rec.*, vol. 12.

⁴⁰ In the case of Article 150, subpara. (h), this usage was retained only in the English version of the text. As to Article 151, para. 10, the Arabic, English, Russian and Spanish texts use 'developing countries' whereas the equivalent of 'developing States' appears in the French text. (It should be noted that there is no difference in the Chinese text between 'developing countries' and 'developing States'.) This lack of linguistic concordance was the direct result of the consensus rule. Thus, where there was no agreement to change the text, the various language versions remained just as they were prepared by the translators. For some observations on the Convention viewed as a multilingual instrument, see pp. 195-9 below.

⁴¹ For further observations see A/CONF.62/L.40 (1979), *Off. Rec.*, vol. 12.

⁴² Article 192 states that 'States have the obligation to protect and preserve the marine environment'.

⁴³ This applied to Articles 21, para. 1 (f), 56 (1) (b) (iii), 234, 266, para. 2 and Article 277, subpara. (c).

⁴⁴ See Article 145 and Annex III, Article 17, para. 1 (b) (xii) and 2 (f). See A/CONF.62/L.40 (1979), *Off. Rec.*, vol. 12.

the text⁴⁵ and 'geographically disadvantaged States' in other provisions of the text provides a good example. The Drafting Committee had recommended in 1979 that the Chairman of the Drafting Committee should consult with the relevant Chairmen on the question of the harmonization of the use of these terms.⁴⁶ However, it was only at the 184th plenary meeting in September 1982 at the resumed eleventh session of the Conference that this question was settled, but then only in part. It was decided that in Articles 69 and 70 the phrase 'States with special geographical characteristics' should be replaced with the phrase 'geographically disadvantaged States' and that 'for the purposes of this Convention' in Article 70, paragraph 2, should be replaced by 'for the purposes of this Part' (Part V).⁴⁷ Consequently, to what extent the definition of 'geographically disadvantaged State' embodied in Article 70, paragraph 2, applies to articles such as Article 161 (composition, procedure and voting of the Council of the Authority) and Article 254 (rights of neighbouring land-locked and geographically disadvantaged States with regard to marine scientific research) is quite an open question.

There were instances, however, where no solution to such problems was found either in the Drafting Committee or in the Conference itself. The use of the words 'ship' and 'vessel' in the English text provides a relevant case. The word 'ship' with few exceptions⁴⁸ is utilized in the provisions emanating from the Second Committee of the Conference, e.g. in Parts II, III, IV, V and VII of the Convention, whereas the word 'vessel' is used in those provisions which fell under the mandate of the Third Committee of the Conference, with the exception of Article 233.

The Drafting Committee had noted that this problem affected only the English and Russian versions of the text, since only one word was used in the other languages.⁴⁹ In its report to the plenary the Drafting Committee observed that 'the words "ship" and "vessel" are not interpreted as meaning different things in the ICNT'.⁵⁰ In support of this interpretation, the Committee recommended that in Article 1 a provision should be added to the English and Russian versions of the text stating that 'ships' and 'vessels' have the same meaning.⁵¹

⁴⁵ The expression appeared in Articles 69 and 70 of the text which were within the mandate of the Second Committee of the Conference.

⁴⁶ A/CONF.62/L.40 (1979), section III, *Off. Rec.*, vol. 12.

⁴⁷ 184th plenary meeting, paras. 17 and 18, *Off. Rec.*, vol. 17.

⁴⁸ See, e.g., Articles 62 and 73 of the Convention on the Law of the Sea.

⁴⁹ For instance 'el buque' in Spanish and 'le navire' in French. This statement was not in fact quite accurate since in the ICNT, A/CONF.62/WP. 10, *Off. Rec.*, vol. 8, the text which was then before the Drafting Committee, the French text had used the expression 'des bateaux de pêche', for instance in Article 62, para. 4 (c). The change to 'les navires de pêche' was made in the third revision of the ICNT. In the Russian text the word судно is utilized to carry the meaning of both 'ship' and 'vessel', whereas военный корабль is the equivalent of 'warship'.

⁵⁰ A/CONF.62/L.40 (1979), section VI, *Off. Rec.*, vol. 12.

⁵¹ A/CONF.62/L.57/Rev. 1 (1980), *Off. Rec.*, vol. 14, p. 126. To the same effect see observations of Italy, 165th plenary meeting, para. 70, *Off. Rec.*, vol. 16.

This recommendation was not generally acceptable. In his report to the Conference the Chairman of the Third Committee pointed out that

this question had been considered at an early stage of the Conference, and after consultations with experts, including the Inter-Governmental Maritime Consultative Organization (IMCO), it was the understanding of the Third Committee that the broader term 'vessel' was more appropriate, for it would cover not only ships but also other floating structures whose use or operation might cause pollution of the marine environment. For this reason, in all international multilateral treaties, in the field of the protection and preservation of the marine environment and especially those adopted under the auspices of IMCO, the broader term 'vessel' has been used.⁵²

Thus the question of harmonizing these two terms was never finally settled. If the observations of the Chairman of the Third Committee on this issue is correct the question may well be posed as to whether 'other floating structures' enjoy the rights accorded to 'ships' in the territorial sea, straits and archipelagic waters under the Convention on the Law of the Sea.⁵³

Another significant instance concerned the use of the expressions 'artificial islands', 'installations and structures', 'artificial islands and other installations', 'installations' and 'platforms and other man-made structures'. The Committee considered several possibilities in its attempt to obtain some harmonization in the use of these terms. For example, it considered adding the words 'artificial islands' and 'structures' where they did not appear, thus making the expression 'artificial islands, installations and structures' the term of art. It may be noted that in such a case only the word 'structures' would have been added to the relevant provisions dealing with deep sea-bed activities and marine scientific research.⁵⁴ The Committee also examined the possibility of inserting a new subparagraph in Article 1 which would have read 'installations includes artificial islands and structures except in Articles 60 and 80', with consequential changes to the pertinent provisions of the Convention. The Committee suggested that under both approaches the word 'platforms' in Article 1, paragraph 5 (a) (i), should be deleted.⁵⁵

Despite serious and prolonged consideration the Drafting Committee was unable to harmonize the use of these expressions. It may be argued that the fear of unravelling the consensus obtained in the Conference on Article 60 serves to explain to a certain extent the Committee's inability to achieve consistent usage in this case. It will be recalled that Article 60 is the basic article on the regime of artificial islands, installations and structures

⁵² A/CONF.62/L.92 (1982), *Off. Rec.*, vol. 16.

⁵³ Of course the fact that only one word is used in other authentic language versions of the text would have to be taken into account in dealing with such an issue. Further see pp. 195-9 below.

⁵⁴ For instance, in Article 153, para. 5; Article 249, para. 1 (a); Article 259 and Article 260. Generally see section VII A/CONF.62/L.57/Rev. 1 (1980), *Off. Rec.*, vol. 14.

⁵⁵ It should be observed that this is the only occasion that this word is used in the text. The reason for its retention is discussed at p. 184 below.

in the exclusive economic zone. In particular, paragraph 1 of that article carefully describes the installations and structures which fall under the control of coastal States.

The variety of expressions employed in the text to refer to the category of ships which enjoy immunity provides another illustration. The following are the relevant expressions: 'a warship or other government ship operated for non-commercial purposes' (Article 31); 'warships and other government ships operated for non-commercial purposes' (Article 32); 'ships owned or operated by a State and used only on government non-commercial service' (Article 96); and 'any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service' (Article 236).

The Drafting Committee had formulated uniform language to replace these divers expressions. It read thus: 'warship, state aircraft,⁵⁶ or ship or aircraft owned or operated by a State and used for exclusively non-commercial purposes'.⁵⁷ This matter did not go beyond the stage of consideration by the Drafting Committee. The Drafting Committee was unable to make any recommendation on this matter, perhaps on account of the lack of time.⁵⁸

The formula which had been considered by the Drafting Committee would have cured certain defects or at least clarified certain ambiguities in the text. In this respect the following questions come to mind. First, in order to enjoy immunity, must ships owned or operated by a State be used *exclusively* on government non-commercial purposes or only 'for the time being'?⁵⁹ Second, what are the implications of the use of the words 'naval auxiliary' in Article 236?⁶⁰

The harmonization process served some important functions. First, it helped immensely in knitting together the various parts of the Convention—emanating as they did from such disparate sources⁶¹—into one

⁵⁶ The choice of the words 'state aircraft' was based on the language of the Convention on International Civil Aviation, 1944: A/CONF.62/L.57/Rev. 1 (1980), section VI, *Off. Rec.*, vol. 14. It should be noted that the Committee also had under consideration a proposal to change the title of Article 236, which reads somewhat misleadingly 'sovereign immunity': *ibid.*

⁵⁷ The Drafting Committee had also pointed out 'as in the negotiating text that there would be no reference to "aircraft" in Articles 31, 32 and 96 and no reference to "warships" in Article 96'.

⁵⁸ See p. 171 above.

⁵⁹ Cf. the French and Russian equivalents of the phrase 'for the time being': 'au moment considéré' and 'в данное время'.

⁶⁰ Some of these issues have been raised in the work of the ILC on the jurisdictional immunities of States and their property. See *GAOR*, 40th Session, Supplement 10 (A/40/10).

⁶¹ On this point the Chairman of the Drafting Committee had made the following observations: 'Another one of the factors which has rendered the work of the Drafting Committee extremely complex arises from the fact that the provisions of the Convention emanate from various sources. They come from various sources, for instance, first, important conventions, such as the Geneva Conventions on the Law of the Sea of 1958, the Convention on the Dumping of Wastes at Sea of 1978, the International Convention for the Prevention of Pollution from Ships of 1973, among others; secondly, provisions which have been the object of lengthy, difficult and delicate negotiations and which now reflect a certain delicate balance; and thirdly, provisions which have been formulated by technical experts who are not necessarily lawyers, such as hydrographers, geologists or economists, or by

comprehensive Convention. It should be recalled that the adoption of a comprehensive Convention was indeed the mandate of the Conference.⁶² Secondly, it gave the members of the Drafting Committee and its subsidiary organs an overall view of a lengthy instrument and as a consequence in a real sense paved the way for the next stage of the Committee's work—the article-by-article review. In addition, the records of this harmonization exercise which in not a few instances virtually amounted to analyses of the issues involved may help to elucidate the meaning of the text of the Convention, albeit, indirectly.

The Committee commenced the article-by-article review of the text at the informal intersessional meeting of the Drafting Committee held in New York from 12 January to 27 February 1981⁶³ and continued this review up to the final intersessional meeting of the Drafting Committee held in Geneva from 12 July to 20 August 1982.⁶⁴ The Committee reviewed the Draft Convention on the Law of the Sea and Resolutions I–IV which now form Annex I of the Final Act of the Conference,⁶⁵ but did not review either the Final Act itself or the statements, tributes and resolutions which constitute Annexes II–VII of the Final Act.

Throughout much of this work the Committee was helped by a computerized text which was of considerable value. It enabled the Committee to do a more accurate analysis of the text and greatly facilitated the task of identifying and dealing with recurring words and phrases.⁶⁶

VIII. THE POLICY OF THE DRAFTING COMMITTEE

(a) *The Structure of the Convention*

The Drafting Committee accepted the basic structure which had been adopted for the proposed new convention on the law of the sea in the ICNT.⁶⁷ After the appearance of the ICNT there was a marked reluctance

lawyers on technical subjects without the participation of such experts': A/CONF.62/L.56 (1980), *Off. Rec.*, vol. 13. Rosenne also noted in the Sixth Committee that the Drafting Committee of the Third UN Conference had the exceptionally difficult task of ensuring full harmonization and concordance in six languages of a series of mini-packages, negotiated by different persons, at different times and in different political contexts. See para. 36 A/C.6/36/SR.56 (1981), *GAOR*, 36th Session, Sixth Committee.

⁶² See General Assembly Resolution 3067 (XXVIII).

⁶³ There was no express mandate from the Conference for this review to be undertaken.

⁶⁴ The Drafting Committee carried out this work during the 10th Session; at the informal intersessional meeting, held in Geneva from 29 June to 31 July 1981; at the resumed 10th Session; at the intersessional meeting of the Drafting Committee held in New York from 18 January to 26 February 1982; at the 11th Session; and at the intersessional meeting of the Drafting Committee held in Geneva from 12 July to 25 August 1982.

⁶⁵ A/CONF.62/121 (1982), *Off. Rec.*, vol. 17.

⁶⁶ A/CONF.62/L.56 (1980), para. 6, *Off. Rec.*, vol. 13, and A/CONF.62/L.67/Rev. 1 (1981), para. 3, *Off. Rec.*, vol. 15.

⁶⁷ On this matter the President of the Conference made the following observations: 'The structure of the informal composite negotiating text does not retain the order of the four parts of the revised negotiating text, but has been established on the principle that the most logical progression in the proposed new convention on the law of the sea would be from areas of national jurisdiction, such

in the Conference itself⁶⁸ as in the Drafting Committee to support any major restructuring of the text, apart from some relatively minor instances. The rearrangement of section 1 of Part XV provides a case in point. The provisions in that section of the Convention were reordered to reflect a more logical sequence.⁶⁹ There was less reluctance to accept proposals for rearrangement of provisions within an article.⁷⁰

as the territorial sea, through an intermediate area such as the exclusive economic zone, to the area of international jurisdiction': A/CONF.62/WP/10/Add. 1 (1977), *Off. Rec.*, vol. 8. This was not necessarily the order which might have been followed; cf. Fitzmaurice's remarks at the 334th meeting of the ILC: '[T]here were two possible methods of classification—either according to the status of waters or according to the rights to be exercised therein. If the latter approach were adopted it would be necessary to start with the articles dealing with common rights, and then to proceed with those special rights enjoyed by the coastal States over the territorial sea, the continental shelf and the contiguous zone': *Yearbook of the ILC*, 1956, vol. 1.

⁶⁸ In the Conference there had been a Peruvian proposal which sought a significant restructuring of the text. See A/CONF.62/L.27 (1978), *Off. Rec.*, vol. 9. In a note appended to the proposal the following explanation was given: 'This proposal follows the order of provisions applicable to various zones, starting from the land: the territorial sea and the contiguous zone (including straits connected to the territorial sea), exclusive economic zone, continental shelf and high seas (followed by the provisions applicable to both the exclusive economic zone and the high seas and by the general provisions concerning vessels). The provisions applicable to special cases come next: archipelagic States, regime of islands, enclosed or semi-enclosed seas, right of access of land-locked States to and from the sea, followed by the international sea-bed area and, lastly, the rest of the provisions to be included in the convention. For Part XIII, relating to the sea-bed and subsoil thereof beyond the limits of national jurisdiction, the title "International sea-bed area" is proposed, to avoid any ambiguity or confusion with other zones of the oceanic space.'

⁶⁹ This resulted from a proposal from the Chinese Language Group which noted that: 'The arrangement of the various articles in Part XV, section 1 (of the Draft Convention), seems to lack logical sequence. The Chinese Language Group ventures to suggest some rearrangement in order to indicate the interrelationship between these articles in a more coherent manner. The suggestions are as follows:

'Articles 279 and 280 would remain in their present respective places as emanating from the general principles governing the settlement of disputes. For instance, article 279 cites the relevant provisions of the Charter of the United Nations, while article 280 emphasizes the freedom to choose the procedures for the settlement of disputes.

'Article 283 would then follow, since it provides generally what is to be done in case of failure to settle disputes in accordance with the procedures of the parties' own choice. This should not be left in suspense as it is now.

'The next article would be 282, because it provides for special circumstances under which the procedures provided in Part XV or, as the English Language Group recommended, in sections 2 and 3 of Part XV, should be preceded by procedures agreed to under some other treaty or agreement.

'Articles 281 and 284 would then follow, since they refer to specific matters having to do with exchanges of views and conciliation.

'Finally, article 285 would conclude the section by referring to the relationship between Part XV, section 1 and Part XI, section 6.

'To summarize, the article order which the Chinese Language Group suggests for consideration is as follows: Articles 279, 280, 283, 282, 281, 284, 285': CLGDC/12 (1981).

⁷⁰ A case in point is Annex IV, Article 5. Note also the modification to Article 47 of the ICNT, in particular with respect to the formulation in the Convention of paras. 8 and 9 of that article in order to achieve harmonization with the other provisions dealing with charts and lists of geographical coordinates—e.g. Articles 16, 75 and 84. See A/CONF.62/L.40 (1979), section XV, *Off. Rec.*, vol. 12, and A/CONF.62/L.63/Rev. 1 (1980), Annex I, *Off. Rec.*, vol. 14.

(b) *Previous Conventions and Instruments*1. *The Geneva Conventions on the Law of the Sea (1958)*

As is well known, many provisions of the 1958 Geneva Conventions on the Law of the Sea can be found in the texts considered by the Drafting Committee. The use of language taken from provisions of the Geneva Conventions was not confined to those parts of the text which were largely concerned with traditional law of the sea matters but was also reflected in other parts of the text.⁷¹ As a general policy the Drafting Committee and its subsidiary organs sought to ensure the integrity of those provisions of the Geneva Conventions which found a place in the new text.

In some cases the Committee deliberately restored the language of the Geneva Conventions. Article 60, paragraph 8, provides a good example. In the Draft Convention on the Law of the Sea⁷² this provision read: 'Artificial islands, installations and structures have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf'. The Drafting Committee, guided by the language used in Article 5, paragraph 4, of the Geneva Convention on the Continental Shelf, proposed the reinsertion of the phrase 'do not possess the status of islands'.⁷³ In the Convention on the Law of the Sea this provision now reads: 'Artificial islands, installations and structures *do not possess the status of islands*. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf' (emphasis added). The point was explicitly made with respect to Article 101. The co-ordinators of the language groups made the following recommendation to the Chairman of the Second Committee: that the reference to subparagraphs (a) and (b) should be changed to subparagraph (a) or (b) to correspond with Article 15, paragraph 3, of the Geneva Convention on the High Seas.⁷⁴

However, there were instances where the Drafting Committee expressly made slight modifications to the text of the Geneva Convention. Some changes were introduced in provisions taken from the Geneva Conventions in order to ensure harmonization with provisions which had been the subject of careful and delicate negotiations at the Third UN Conference on the Law of the Sea. For instance, the phrase 'pay due regard' was used in Article 27, paragraph 4, and in Article 79, paragraph 5. These provisions were based respectively on Article 19, paragraph 4, of the Geneva

⁷¹ See, e.g. Article 60, para. 8, Article 147, para. 2 (e) and Article 259. These articles deal with the legal status of artificial islands, installations and structures and are modelled on Article 5, para. 4, of the Geneva Convention on the Continental Shelf.

⁷² A/CONF.62/WP.10/Rev. 3 (1980). This language had remained unchanged since the publication of the Informal Single Negotiating Text.

⁷³ A/CONF.62/L.40 (1979), section XI, *Off. Rec.*, vol. 12.

⁷⁴ This was raised under the rubric 'Items requiring consultations': A/CONF.62/L.56 (1980), Annex C, para. 6, *Off. Rec.*, vol. 13.

Convention on the Territorial Sea and Contiguous Zone and Article 26, paragraph 3, of the Geneva Convention on the High Seas. On the other hand, the phrase 'have due regard' appeared in Article 56, paragraph 2, and Article 58, paragraph 3—provisions which lay at the heart of the new regime of the exclusive economic zone and whose language had been intensively negotiated. Such factors played a part in the Drafting Committee's decision to use the phrase 'have due regard' rather than 'pay due regard' in Articles 27 and 79 of the Convention.⁷⁵

Other modifications to language borrowed from the Geneva Conventions were made simply for the purpose of harmonization. A relevant example is provided by the substitution in Articles 113, 114 and 115 of the expression 'take the necessary legislative measures' by 'adopt the laws and regulations necessary'. These articles were modelled on Articles 27, 28 and 29 of the Geneva Convention on the High Seas.⁷⁶

A few changes to the Geneva Conventions were made for the purpose of legal consistency,⁷⁷ and, in at least one case, in order to correct a grammatical error.⁷⁸

2. *Other conventions and instruments*

The Committee was guided in its use of language by several other conventions and instruments. The Charter of the UN exerted a significant influence on certain provisions in Part XI of the Convention. For instance, the first sentence of Annex IV, Article 7, paragraph 3, of the Draft Convention, which read in part: 'The Director-General and the staff of the Enterprise, in the discharge of their duties, shall not seek or receive instructions from any Government or from any other source', was changed to read: 'In the performance of their duties the Director-General and the staff of the Enterprise shall not seek or receive instructions from any Government or from any other source external to the Enterprise'. The change followed the language of Article 168, paragraph 1, and it was determined by the fact that the latter was modelled on Article 100, paragraph 1, of the Charter of the UN. In another instance, the phrase 'shall be to secure employees of the highest standards of efficiency, competence and

⁷⁵ See A/CONF.62/L.57/Rev. 1 (1980), section V, *Off. Rec.*, vol. 14. See too the change in Article 25, para. 3 (based on Article 16, para. 3, of the Geneva Convention on the Territorial Sea and Contiguous Zone), of the phrase 'without discrimination' to 'without discrimination in form or fact' to conform with Article 24, para. 1 (b), Article 42, para. 2 and Article 52, para. 2: A/CONF.62/L.67/Add. 1, p. 32 (mimeographed).

⁷⁶ See pp. 175–6 above. See too the change of 'low tide' to 'low-water' in Article 9 (cf. Articles 5 and 7). Article 9 of the 1982 Convention is based on Article 13 of the Geneva Convention on the Territorial Sea and Contiguous Zone. See A/CONF.62/L.67/Add. 1, p. 14 (mimeographed).

⁷⁷ Note, for instance, the insertion of 'aircraft' in Article 105, the first sentence of which now reads as follows: 'On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship *or aircraft* taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.' The words in italics were not in Article 19 of the Geneva Convention on the High Seas on which this article is modelled. See A/CONF.62/L.67/Add. 5, p. 46 (mimeographed).

⁷⁸ Note the change from 'are' to 'is' in Article 111, para. 4, line 4. See Article 23, para. 3, of the Geneva Convention on the High Seas. See A/CONF.62/L.67/Add. 5, p. 67 (mimeographed).

integrity' in Article 167, paragraph 2, of the Draft Convention was replaced by the phrase 'shall be the necessity of securing the highest standards of efficiency, competence and integrity' following Article 101, paragraph 3, of the Charter of the UN.⁷⁹

The International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties is also a case in point. The phrase 'coastlines or related interests' in Article 142, paragraph 3, and Article 211, paragraph 7, of the Draft Convention⁸⁰ was replaced by 'coastline or related interests', thus adhering to Article 1 of the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.⁸¹

It may be noted here that the retention of the phrase 'platforms or other man-made structure at sea' in Article 1, paragraph 5 (a) (i), was due to the fact that that formula was employed in Article III of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972).⁸²

Article I (1) provides an example of the role played by a significant international instrument. It reads: 'Area means the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction' and was modelled on paragraph 1 of the 1970 Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction. This instrument was an important factor in the retention by the Drafting Committee of that terminology.⁸³

(c) *Matters of Substance*

As has already been pointed out, the competence of the Drafting Committee was restricted by the Rules of Procedure of the Conference. The Committee's mandate was, *inter alia*, to 'co-ordinate and refine the drafting of all texts referred to it, without altering their substance'. The Drafting Committee was very mindful of proposing modifications to the text which

⁷⁹ The Statute of the International Court of Justice, as can be expected, was indeed the point of departure for many of the dispute settlement provisions of the Convention and its annexes, divergences from it being carefully scrutinized by the Drafting Committee. In certain areas changes were made in the texts to conform with the language used in the Statute. See, for example, Article 293, para. 2, of the ICNT which was modified to reflect the language of Article 38, para. 2, of the Statute of the International Court of Justice. Note also modifications to Article 6, para. 2 and Article 27, para. 1 (now Article 26, para. 1, of the Convention on the Law of the Sea), of the Draft Convention. Cf. Article 15 and Article 45 of the Statute of the International Court of Justice.

⁸⁰ A/CONF.62/WP.10/Rev. 3.

⁸¹ For the possible implications of this particular change with respect to the interpretation of the phrase 'related interests' see pp. 194-5 below.

⁸² Article 1, para. 5 (a), with some modifications is expressly modelled on Article III of the 1972 Dumping Convention. In the Revised Single Negotiating Text (A/CONF.62/WP.8/Rev. 1/Part III (1976)) a footnote was appended to Article 20 (now Article 210 of the Convention) which stated: 'The following article will be included at the appropriate place to be decided on by the Drafting Committee. For the purposes of this Convention, the term "dumping" is construed in the context of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, done at London on 29 December 1972': *Off. Rec.*, vol. 5. See p. 178 above.

⁸³ For an attempt to change 'sea-bed and ocean floor and subsoil' to 'sea-bed and subsoil' see A/CONF.62/L.56 (1980), Annex C, para. 8, *Off. Rec.*, vol. 13.

had or were perceived as having substantive implications. In the harmonization stage of its work, the Committee adopted the practice of bringing such matters to the attention of the President of the Conference and to the Chairmen of the Main Committees. For instance, in a letter dated 26 March 1980, addressed to the President of the Conference and the Chairmen of the Main Committees and the negotiating groups, the Chairman of the Drafting Committee noted the following items, *inter alia*, as requiring consultations:

- (i) Articles 259, 260 and 261 deal with scientific research installations. These articles are repetitions of matters dealt with in articles 60 and 147. They might therefore be deleted and, in their place, a reference could be made to the relevant paragraphs of article 60. The co-ordinators of the language groups recommended that this be brought to the attention of the chairmen of the relevant committees.
- (ii) The co-ordinators of the language groups recommended that the Chairman of the Drafting Committee draw the attention of the Chairmen of the Second and Third Committees to the fact that article 73, on fisheries enforcement, does not contain any provision requiring clear marking of enforcement vessels, such as that which appears in articles 107, 111, paragraph 5, and 224.
- (iii) Paragraph 1 of article 58 uses the phrase 'other internationally lawful uses of the sea'. It is recommended that the Chairman of the Drafting Committee consult with the Chairmen of the committees as to the possibility of redrafting paragraph 4 of article 194 ('activities in pursuance of the rights and duties of other States exercised in conformity with this Convention') and article 240 (c) ('other legitimate uses of the sea') in order to harmonize them with paragraph 1 of article 58. It is also recommended that the Chairman of the Drafting Committee should consult the Chairmen of the committees as to the harmonizing of paragraph 3 of article 155 ('various forms of activities in the Area and in the marine environment') with article 147 ('activities in the Area . . . other activities in the marine environment').⁸⁴

Some of these issues were eventually resolved.⁸⁵ However, it is fair to state that generally the Conference found itself, for whatever reasons, unable to deal with issues of this nature which the Drafting Committee had brought to its attention or that of its officers. There was a fear, perhaps justified, that any attempt to deal with such issues at that stage of the Conference would reopen matters which had already been exhaustively discussed and on which general agreement had been reached—a further reason why the Drafting Committee should have become involved in the Conference process much earlier than had been the case.

During the article-by-article review of the text the Drafting Committee was reluctant to submit such matters to the Conference as it became increasingly difficult to obtain any consensus within the Committee and

⁸⁴ A/CONF.62/L.56 (1980), Annex C, paras. 3, 5 and 7, *Off. Rec.*, vol. 13.

⁸⁵ Note the question concerning the use of the terms 'States with special characteristics' and 'geographically disadvantaged States'. See pp. 176 and 177 above.

its subsidiary organs on any such submission. It was felt, though not formally expressed, that the mere submission of matters of that nature would exceed the Committee's mandate.⁸⁶ It was left to individual delegations to raise those matters in the relevant forum. Article 285 provided a case in point. The French Language Group noted that:

Cet article ne semble plus avoir de sens puisque la section 6 de la partie XI dans sa nouvelle teneur, ne soumet rien aux procédures de la section 2 de la partie XV. Il s'ensuit la nécessité soit d'éliminer l'article 285, soit de lui donner un sens différent. Si la seconde solution était adoptée, on pourrait envisager de soumettre à la section I de la partie XV soit la totalité, soit certaines catégories des différends visés à la section 6 de la partie XI. Dans cette éventualité il conviendrait encore d'examiner si cette soumission devrait porter sur l'ensemble de la section I de la partie XV ou seulement sur certaines dispositions de celle-ci (notamment sur les articles 281 et 184).⁸⁷

The Drafting Committee was unable to deal with this issue. This matter was later raised, to no avail, by the Swiss delegate at the 184th plenary meeting during the resumed eleventh session of the Conference.⁸⁸

It was precisely to deal with issues of this nature, or perhaps more correctly with the borderline cases (i.e. those which seemed to raise issues of substance), that informal consultations came to play an increasingly significant role. They were generally carried out in groups which were open to representatives of all language groups.⁸⁹ This mechanism enabled the Drafting Committee to resolve some particularly sensitive questions.⁹⁰

⁸⁶ This type of issue arose at the UN Conference on Succession of States in respect of Treaties during the consideration of Draft Article 28—now Article 29 of the Vienna Convention on Succession of States in respect of Treaties (1978). The Chairman of the Drafting Committee, Mr Yasseen, in his report to the Committee of the Whole on the work of the Drafting Committee noted that 'the Drafting Committee had decided not to make any changes in article 28. Nevertheless, he had to report the absence of a consensus in the Drafting Committee on the interpretation of paragraph 1, subparagraph (b). The question arose whether, under the terms of that subparagraph in its present form, it was sufficient for notice of termination of provisional application to be given by one party or whether all parties had to give such notice. Some members of the Drafting Committee interpreted the provision as requiring notice to be given by one of the parties, with the explicit or implicit agreement of the others, while other members believed that notice of termination had to be given by all the parties.' It was argued at the Conference that the Drafting Committee had exceeded its mandate in regard to Article 28 and it was not proper for the Drafting Committee to seek the help of the Committee of the Whole in resolving its own difficulty in understanding an article. The Chairman of the Drafting Committee responded that the Drafting Committee did have a mandate to draft a clear text, and 'it was incumbent on it to point out to the Committee of the Whole cases in which the rule adopted by that body was not sufficiently clear from the proposed wording and would perhaps be better expressed. The Committee of the Whole naturally remained sovereign to amend the text and to state that it should be interpreted in a certain way.' This writer submits that therein lies the proper role of a Drafting Committee with respect to such matters. See Committee of the Whole, 35th meeting, paras. 59-85, *Official Records of the United Nations Conference on Succession of States in respect of Treaties*, vol. I (1977).

⁸⁷ DC/Part XV/Article 285, p. 9.

⁸⁸ 184th plenary meeting, para. 13, *Off. Rec.*, vol. 17.

⁸⁹ See A/CONF.62/L.75 (1981), para. 2, *Off. Rec.*, vol. 15.

⁹⁰ Note, for example, the change from 'sites' to 'areas' in Annex III, Articles 7, para. 6, 8, 9, 14, para. 3, and 17 para. 2 (a), of the Draft Convention: Report of the Chairman of the Drafting Committee, A/CONF.62/L.152/Add. 26/Corr. 2 (mimeographed). On the nature of this specific problem see Report of the Chairman of the Drafting Committee, A/CONF.62/L.89 (1982), para. 3, *Off. Rec.*, vol. 16.

The Drafting Committee reviewed a text which was largely the product of political compromises between conflicting interests where clarity had at times to be sacrificed for the sake of obtaining consensus—a process which necessarily resulted, on not a few occasions, in ambiguous provisions. The Drafting Committee tended to leave these political compromises undisturbed and to disregard the ambiguities in the text. It is noteworthy that in at least one case the Drafting Committee deliberately ensured that the ambiguity was preserved: the *chapeau* of Article 216, paragraph 1, provides an illustration. This provision read as follows:⁹¹

English text

Laws and regulations adopted in accordance with this Convention and applicable international rules and standards established through competent international organizations or diplomatic conference for the prevention, reduction and control of pollution of the marine environment by dumping shall be enforced: . . .

French text

Les lois et règlements adoptés conformément à la Convention et *aux* règles et normes internationales applicables établies par l'intermédiaire des organisations internationales compétentes ou d'une conférence diplomatique en vue de prévenir, réduire et maîtriser la pollution du milieu marin par immersion de déchets sont mis en application par: . . .⁹²

Spanish text

Las leyes y reglamentos dictados de conformidad con esta Convención y *con* las reglas y normas internacionales aplicables establecida por conducto de las organizaciones internacionales competentes o en una conferencia diplomática para prevenir, reducir y controlar la contaminación del medio marino causado por vertimientos serán ejecutados: . . .⁹²

In the Drafting Committee the question arose whether both the phrases 'Laws and regulations' and 'international rules and standards' were the subject of the verb 'shall be enforced', or whether the verb was governed only by the phrase 'Laws and regulations'. The French and Spanish texts as they then stood made it quite clear that the latter grammatical interpretation was correct. The English text was ambiguous in this respect.⁹³

In the event, upon the recommendation of the Drafting Committee, the prepositions 'aux' and 'con' were deleted in both the French and Spanish texts. As a consequence the ambiguity in the English text was not only retained but was strengthened by its incorporation in the French and Spanish texts.

⁹¹ The text then before the Drafting Committee was the Draft Convention on the Law of the Sea (Informal Text), A/CONF.62/WP.10/Rev. 3.

⁹² Emphasis added.

⁹³ The Chinese Language Group noted that 'in the Chinese text, "laws and regulations" and "applicable international rules and standards" are parallel subjects, while both the French and Spanish texts have in effect "laws and regulations adopted in accordance with this Convention and *with* applicable international rules and standards".' The group observed that clarification as to which interpretation was correct was necessary: DC/Part XII/Article 216.

IX. THE PROCEDURES FOR ADOPTION OF THE COMMITTEE'S RECOMMENDATIONS

Three types of procedure have been utilized for the adoption of the Drafting Committee's recommendations. The procedure for incorporating in the various revisions of the text the first set of recommendations emerging from the early work of the Committee—the process of harmonization⁹⁴—was left largely to the discretion of the Chairmen of the Main Committees. Each Chairman decided whether or not a particular recommendation was to be incorporated into the text. For example, in a reply to a letter dated 26 March 1980 from the Chairman of the Drafting Committee requesting the incorporation of the Drafting Committee's recommendations in the revision of the ICNT, the Chairman of the Second Committee indicated which recommendation, in his opinion, would be applied at that stage.⁹⁵ These included, *inter alia*, the use of 'developing States' in Articles 61, 62 and 82, and the use of the expression 'protection and preservation of the marine environment' in Articles 56 and 123. The Chairman of the Third Committee also replied, noting the changes made in accordance with the recommendations of the Drafting Committee to the text within his mandate.⁹⁶ The recommendations concerning, *inter alia*, the use of the expression 'activities in the Area' in Articles 209, 215, 273 and 274⁹⁷ and the insertion of the 'marine' to the phrase 'transfer of technology' in Articles 276, paragraph 1, and 277, subparagraph (g), were adopted.

Further recommendations resulting from the harmonization work of the Drafting Committee were in fact examined at the resumed ninth session of the Conference by both the Second and Third Committees.⁹⁸ It is of some procedural importance to note that the Second Committee examined only those recommendations which touched, in some manner, upon the substance of the text.⁹⁹

The Conference devised a different procedure for dealing with recommendations coming from the article-by-article review of the provisions of the Draft Convention. These recommendations¹⁰⁰ were considered

⁹⁴ See A/CONF.62/L.40 (1979), *Off. Rec.*, vol. 12; A/CONF.62/L.57/Rev. 1 (1980) and A/CONF.62/L.63/Rev. 1 (1980), *Off. Rec.*, vol. 14.

⁹⁵ See A/CONF.62/L.56 (1980), Annex A, *Off. Rec.*, vol. 13, and A/CONF.62/L.57/Rev. 1 (1980), *Off. Rec.*, vol. 14, Annex I (mimeographed).

⁹⁶ *Ibid.* There was no reply from the Chairman of the First Committee on those harmonization proposals.

⁹⁷ Article 1, para. 1 (3), which defines the meaning of 'activities in the Area', provided the basis for this harmonization.

⁹⁸ See drafting changes accepted by the Third Committee, letter dated 26 August 1980 from the Chairman of the Drafting Committee incorporated in A/CONF.62/L.63/Rev. 1 (1980), Annex II, *Off. Rec.*, vol. 14, and the Statements in the 134th plenary meeting of the Conference by the Chairman of the Third Committee: A/CONF.62/SR.134 (1980), paras. 36–38, *Off. Rec.*, vol. 14.

⁹⁹ A/CONF.62/L.63/Rev. 1 (1980), Annex IIB, *Off. Rec.*, vol. 14.

¹⁰⁰ These are contained in docs. A/CONF.62/L.67/Rev. 1/Add. 1–16; A/CONF.62/L.75/Add. 1–13; A/CONF.62/L.85/Add. 1–9; A/CONF.62/L.142/Rev. 1/Add. 1; and A/CONF.62/L.152/Add. 1–27 (mimeographed).

at informal plenary meetings of the Conference and not in the Main Committee. When the Informal Plenary met to consider the recommendations of the Drafting Committee, the Chairman of the relevant Committee as well as the Chairman of the Drafting Committee would sit on the podium with the President. It was observed that this procedure was adopted to ensure that the process of examining these recommendations should not result in any lack of harmonization or co-ordination.¹⁰¹ The choice of this informal procedure to deal with the recommendations of the Drafting Committee, though consistent with the spirit of the Conference, had, in this writer's opinion, real disadvantages.¹⁰² On account of this procedure many valuable observations on the various provisions of the text did not form part of the *formal* records of the Conference since there were no summary records of these proceedings.

X. INTERPRETATION OF THE CONVENTION IN THE CONTEXT OF THE WORK OF THE DRAFTING COMMITTEE

The Drafting Committee had foreseen the possibility of its documentation being used for interpretative purposes and had indeed attempted at least to minimize such utilization. In the Report of the Chairman of the Drafting Committee in 1981 it was stated that

The fact that the Committee decided to propose or not to propose a drafting change does not imply either agreement or disagreement with reasons proffered therefor orally or in writing, nor does it imply any conclusion regarding the meaning of any existing text. Moreover the decision to propose, or not to propose, harmonization of or a distinction between terms used in different provisions implies no conclusions as to whether these terms have the same or different meaning.¹⁰³

It further observed that

In order to ensure that the consideration of drafting changes does not give rise to substantive interpretative records, the Committee and its organs have followed the practice of avoiding records of the discussions of drafting changes and the reasons therefor.¹⁰⁴

It may here be pointed out that the meetings of the Drafting Committee and its subsidiary organs were informal. Indeed, as has already been noted, there were no summary records of the discussions which took place when the recommendations of the Drafting Committee were

¹⁰¹ See note by the President on the programme of work: A/CONF.62/110 (1981), para. 5, *Off. Rec.*, vol. 15. For the reports of the informal meetings of the plenary see the following documents: A/CONF.62/L.72 and A/CONF.62/L.82 (both 1981), *Off. Rec.*, vol. 15; A/CONF.62/L.90, *Off. Rec.*, vol. 16; A/CONF.62/L.147, *ibid.*; and A/CONF.62/L.160, *Off. Rec.*, vol. 17.

¹⁰² *Per contra* the delegation of Japan observed 'that his delegation preferred informal meetings without records for consideration of the Drafting Committee's recommendations, so as to avoid lengthy expositions of substantive views of delegations on individual articles': 145th plenary meeting, para. 14, *Off. Rec.*, vol. 15.

¹⁰³ A/CONF.62/L.67/Rev. 1 (1981), para. 5, *Off. Rec.*, vol. 15.

¹⁰⁴ *Ibid.*, para. 6.

submitted to the plenary, since, as has already been noted, even these meetings were informal. Nevertheless a mass of documentation emerged from the transactions of the Drafting Committee and its subsidiary organs. This documentation in fact deals with almost all the provisions contained in the Convention and its annexes and is thus necessarily voluminous, given the length of the instrument.¹⁰⁵ Thus, whatever consequences the above-quoted observations may have, it is almost inconceivable that the documentation of the Drafting Committee will not play a part in the interpretative process.¹⁰⁶

In this connection three questions arise. First, can the documentation of the Drafting Committee be considered as part of the preparatory work (*travaux préparatoires*) of the Convention on the Law of the Sea and consequently be treated as one of the supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention on the Law of Treaties?¹⁰⁷ Secondly, does the documentation of the Drafting Committee constitute interpretative material? Thirdly, to what extent does the procedure adopted by the Drafting Committee—especially the establishment of language groups—affect the interpretation of the Convention as a multilingual instrument?

(a) *Preparatory Work* (travaux préparatoires)

Neither the Institute of International Law in its work on the interpretation of treaties nor the ILC¹⁰⁸ in its consideration of the law of treaties attempted to define '*travaux préparatoires*'. The ILC in its commentary on Article 32 of the Vienna Convention on the Law of Treaties (Article 28 of the Draft Articles) deliberately did not define the term. The Commission

¹⁰⁵ It is quite unusual for a Drafting Committee of an international conference to have produced so much documentation.

¹⁰⁶ To the same effect see Rosenne: 'The meaning of "authentic text" in modern treaty law', *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler* (1983), pp. 759–84 at p. 778.

¹⁰⁷ Article 32 of the Vienna Convention, on supplementary means of interpretation, reads as follows: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.'

¹⁰⁸ Within the context of the work of the Institute of International Law there were attempts to define the term. Lauterpacht seemed to have included 'les procès-verbaux at les documents relatifs aux négociations, les instructions transmises aux délégués, les comptes rendus des discussions, les états successifs du projet, les déclarations prononcées d'un commun accord, les rapports autorisés, bref tous les documents qui ont précédé la conclusion du traité'. See his Report on the Interpretation of Treaties to the Institute of International Law, *Annuaire de l'Institut de Droit International*, 43 (i) (1950), p. 392. For the original English text see *International Law being the Collected Papers of Hersch Lauterpacht*, vol. 4 (1978), p. 529. McNair thought it necessary to restrict the meaning of the term and in fact proposed the following definition: 'travaux préparatoires, c'est à dire les travaux auxquels tous les signataires du traité ont participé en commun au cours de la négociation et avant la signature du traité'. *Annuaire de l'Institut de Droit International*, 44 (ii) (1952), p. 367.

observed that nothing 'would be gained by trying to define *travaux préparatoires*; indeed to do so might only lead to the possible exclusion of relevant evidence'.¹⁰⁹

In the arbitral award in *Belgium, France, Switzerland, the United Kingdom and the United States of America v. Federal Republic of Germany*,¹¹⁰ the tribunal made a noteworthy attempt to define the concept of *travaux préparatoires*. It observed that

It must first be stressed that the term must normally be restricted to material set down *in writing* and thereby actually available at a later date . . . A further prerequisite if material is to be considered as a component of *travaux préparatoires* is that it was actually *accessible* and known to all the original parties. Drafts of particular articles, preparatory documents and proceedings of meetings from which one member or some members of the contracting parties were excluded cannot serve as an indication of *common intentions* and agreed definitions unless all the parties had become familiar with the documents or material by the time the treaty was signed.¹¹¹

In light of these observations, for material to qualify as *travaux préparatoires* it must be in writing, it must have been known and accessible to all the parties when the treaty was signed and must obviously be relevant. The documentation of the Drafting Committee fulfils these requirements. In this connection the procedure adopted by the Drafting Committee and its subsidiary organs assumes some significance. As has already been mentioned, the language groups and the meetings of the co-ordinators—subsidiary organs of the Drafting Committee—were open to all delegations.¹¹²

To what extent can the documentation of the Drafting Committee indicate the common intention of the parties to the Convention on the Law of the Sea? As is well known, doubts have been cast on the very notion of the common intention of the parties as being the object of interpretation. As has been aptly observed,

The purpose of interpretation is often said to be to discover the intention of the parties. But there is a strong element of fiction even in this most general of principles; for in many cases the dispute arises precisely because there was no common intention of the parties either because the point was not thought of or because there were diverse intentions which were eventually comprehended not by a compromise but by a deliberate ambiguity or lacuna in the text.¹¹³

¹⁰⁹ Report of the ILC on the second part of its 17th Session and at its 18th Session, *GAOR*, 21st Session, Supplement 9 (A/6309/Rev. 1, Part II, Chapter II, article 28); Commentary, para. (20), *Yearbook of the ILC*, 1966, vol. 2, reproduced in *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*.

¹¹⁰ 59 ILR 494–591, award of 16 May 1980 (referred to hereinafter as the *Young Loan* arbitration).

¹¹¹ 59 ILR 544–5 (emphasis added).

¹¹² See pp. 171–2 above.

¹¹³ Jennings, 'General Course on Principles of Public International Law', *Recueil des cours*, 121 (1967–II), p. 323 at p. 544. For instances of further observations to the same effect see Beckett, *Annuaire de l'Institut de Droit International*, 43 (i) (1950), p. 438, and O'Connell, *International Law* (2nd edn., 1970), vol. 1, p. 252. Cf. Yasseen, 'L'Interprétation des traités d'après la Convention de Vienne sur le droit des traités', *Recueil des cours*, 151 (1976–III), p. 1 at p. 85. See too Fitzmaurice, 'The Law and Procedure of the International Court of Justice', this *Year Book*, 28 (1951), at pp. 3–4.

To this may be added the consequences of the characteristic feature of the Third UN Conference on the Law of the Sea itself, that is to say the consensus procedure.¹¹⁴ The application of this procedure to all decisions of the Conference on substantive matters during the course of its work¹¹⁵ carried with it the risk of formulating provisions where precision and clarity had at times to be necessarily and deliberately sacrificed in order to gain general acceptance and thus obtain the required consensus.¹¹⁶ In such cases it will also be difficult to discover any common intention.

Given the difficulties surrounding the quest for the common intention of the parties—difficulties which the procedure adopted by the Third UN Conference on the Law of the Sea has only increased—it is submitted that, where problems of interpretation arise, the records of the Drafting Committee will be useful not so much in discovering the common intention of the parties but simply in providing assistance in the appreciation of the meaning of the text itself.¹¹⁷ That is not to say that it may not help in finding out that intention where in fact it exists.

It has been argued that the documentation of the Drafting Committee of the Third UN Conference on the Law of the Sea is limited by the fact that very often no clear conclusions can be drawn from it.¹¹⁸ This criticism, for what it is worth, can be and has been levelled at the *travaux préparatoires* of several, if not all, international instruments.¹¹⁹ The documentation of the Drafting Committee is not unique in this respect.

The documentation of the Drafting Committee and its subsidiary organs is the record of the recommendations and observations of the Committee and its subsidiary organs on almost every article of the Convention, its annexes and Resolutions I and II of Annex I of the Final Act. It is submitted that as questions of meaning and intent arise these documents will of necessity play a role, perhaps an invaluable role, in the interpretation of the Convention in accordance with the provisions on interpretation contained in the Vienna Convention on the Law of Treaties.

¹¹⁴ This procedure was formally incorporated in the Rules of Procedures of the Conference, A/CONF.62/30/Rev. 2, Rule 37 and appendix.

¹¹⁵ The fact that this Convention was adopted by a recorded vote does not, in this writer's opinion, affect the validity of this proposition.

¹¹⁶ To the same effect see the observations of the Netherlands on the Report of the Secretary-General on the Review of the Multilateral Treaty-Making Process: A/35/312/Add. 1, para. 20 (1980).

¹¹⁷ In the sense of the text being 'the expressed intention of the parties, that is their intention as expressed in the words used by them in the light of the surrounding circumstances': McNair, *The Law of Treaties* (1961), p. 365. See also Brownlie, *Principles of Public International Law* (3rd edn., 1979), p. 624.

¹¹⁸ See Treves, 'Une nouvelle technique dans la codification du droit international: le Comité de rédaction de la Conférence sur le droit de la mer', *Annuaire français de droit international*, 27 (1981), pp. 65–85 at p. 85.

¹¹⁹ See, for instance, Beckett, loc. cit. above (p. 191 n. 113), at p. 440, and Sinclair, *United Nations Conference on the Law of Treaties, Official Records*, 33rd Meeting of the Whole, paras. 8–10, and *per contra* note the observation that 'nothing could be more arbitrary than the automatic rejection of the preparatory work on the pretext that it is rarely conclusive and often gives rise to abuse': Hardy, 'Interpretation of Plurilingual Treaties', this *Year Book*, 37 (1961), p. 105—a proposition with which this writer agrees.

(b) *The Documentation of the Drafting Committee as Interpretative Material*

Certain observations of the language groups constituted quite directly interpretative records of the Convention on the Law of the Sea. The observations of the Arabic Language Group on Article 246, paragraph 5 (a),¹²⁰ is perhaps the *locus classicus* of the phenomenon. It read:

The Group considers that the expression 'is of direct significance for' in the English text is not accurate. It considers also that the equivalents in the other texts differ greatly in meaning. It considers that all the texts must be co-ordinated and prefers the use of the expression 'has direct effect on', which is used in the Arabic text. The Group considers also that the use of the same expression 'is of direct significance for' in paragraph 2 of article 249 accurately reflects the meaning intended to be conveyed in that paragraph, but that it does not reflect the meaning intended to be conveyed in paragraph 5 (a) of article 246.¹²¹

It may be noted that this observation drew no comment from the Drafting Committee.

Far more often these proposals raised issues of interpretation in a more indirect manner. For example, the Spanish Language Group questioned whether the absence of any reference to 'weapon exercises' in Article 52 was deliberate or merely an oversight.¹²² It will be recalled that pursuant to Article 25, paragraph 3, a coastal State may suspend in specified areas of its territorial sea the innocent passage of foreign ships 'if such suspension is essential for the protection of its security, including weapon exercises'.¹²³ Article 52 itself deals with the issue of innocent passage in archipelagic waters; in particular, paragraph 2 deals with the question of the suspension of innocent passage in such waters.

The Spanish Language Group also raised the question of the references in Article 139 to 'international organizations'.¹²⁴ Under that article, international organizations, *inter alia*, have the responsibility to ensure that activities in the Area carried out by such organizations are effectively

¹²⁰ Article 246, para. 5, reads as follows: 'Coastal States may however in their discretion withhold their consent to the conduct of a marine scientific research project of another State or competent international organization in the exclusive economic zone or on the continental shelf of the coastal State if that project:

- '(a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;
- '(b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;
- '(c) involves the construction, operation or use of artificial islands, installations and structures referred to in articles 60 and 80;
- '(d) contains information communicated pursuant to article 248 regarding the nature and objectives of the project which is inaccurate or if the researching State or competent international organization has outstanding obligations to the coastal State from a prior research project.'

¹²¹ ALGDC/9 (1981).

¹²² SLGDC/8/1 (1981).

¹²³ This article is of course based on Article 16, para. 3, of the Geneva Convention on the Territorial Sea. The phrase 'including weapon exercises' was introduced into the provision during the negotiations at the Third UN Conference on the Law of the Sea.

¹²⁴ SLGDC/21 (1981).

controlled by them. International organizations, *inter alia*, are liable for any damage resulting from a failure to discharge that responsibility. However, Article 153, which is the basic provision on the system of exploration and exploitation of the Area, makes no reference to international organizations as being entitled to carry out activities in the Area.¹²⁵

The French Language Group's observation on Article 144 offers another illustration. The Group noted that 'l'adjectif "commerciales" qui qualifie les conditions et modalités du transfert des techniques a l'Annexe III, article 5, ne figure pas à l'article 144'.¹²⁶

It is not suggested here that as a general rule proposals coming from the language groups directly raised issues of interpretation. In fact, several of these proposals simply dealt with matters such as punctuation, grammar and style. Of course even proposals of this nature may have a bearing on the interpretation of a provision in the Convention. However, a significant number of these proposals raised expressly, or more often impliedly, issues of interpretation. To that extent the records of the language groups, including proposals which were rejected or observations not commented upon, may constitute elements of the preparatory work of the Convention. In assessing the value of the records of the Drafting Committee, and in particular the records of proposals and observations which did not find a place in the Drafting Committee's recommendations to the plenary of the Conference, one should bear in mind, as has already been observed, that as a general rule, the Committee found it difficult to obtain consensus for the acceptance of proposals even when they were simply intended to improve the clarity of the text.¹²⁷ There was reluctance to effect changes in a text which had been so laboriously elaborated.

As has been stated earlier, the Drafting Committee was guided in its choice of language by previous conventions and instruments.¹²⁸ Where the Drafting Committee submitted proposals which were based on the language of other conventions, it is reasonable to assume that those conventions would shed light on the meaning of the relevant provisions. As an example, does the phrase 'related interests', which is not defined in the Convention on the Law of the Sea, have the same meaning as is assigned to it in the International Convention relating to Intervention on the High

¹²⁵ Article 153, para. 2, stated that: 'Activities in the Area shall be carried out as prescribed in para. 3: (a) by the Enterprise, and (b) in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III.' In its recommendations to the Plenary of the Conference the Drafting Committee itself repeated that observation. It noted 'that article 139 included references to international organizations whereas article 153, which has not yet been considered, does not contain any such explicit references'. See A/CONF.62/L.67/Add. 16 (1981), p. 11. That was as far as the matter went since in this connection both provisions remained unchanged.

¹²⁶ FLGDC/14 (1981).

¹²⁷ See p. 173 above.

¹²⁸ See pp. 182-4 above.

Seas in Cases of Oil Pollution Casualties (1969)?¹²⁹ In the opinion of this writer it probably does, since the phrase 'related interests' is too vague and unspecific to have any concrete meaning standing on its own.

(c) *The Convention as a Multilingual Instrument*

To what extent does the procedure adopted by the Drafting Committee—especially the establishment of language groups—affect the interpretation of the Convention as a multilingual instrument? This question raises certain important issues connected with the interpretation of multilingual treaties, especially the role of the basic or original text.

According to Article 320 of the Convention on the Law of the Sea, the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic. The text of the Convention is therefore equally authoritative in all the six languages,¹³⁰ and for purposes of interpretation of the Convention there are no subordinate texts.

It has been suggested that since 'all the negotiating texts from the single negotiating text onwards had been presented originally in English, and English was the language in which most of the negotiations in the Conference had been conducted', the English version of the Convention should enjoy a special status.¹³¹ Thus, wherever there is an irreconcilable divergence between the various language versions, resort should be made to the English version of the text.

It will be recalled that the role of the basic or original text was discussed by the ILC in its work on the law of treaties. At its 874th meeting in 1966 Verdross argued for the insertion of a provision to the effect that 'if it was impossible to find a meaning which reconciled the texts, the language to be considered should be that in which the treaty had been

¹²⁹ See p. 184 above. On the relationship of this Convention to Article 221 ('Measures to avoid pollution arising from maritime casualties'), see observations of the Soviet delegation in the Third Committee of the Conference, 38th meeting, para. 52, *Off. Rec.*, vol. 9.

¹³⁰ For the rules of interpretation of treaties authenticated in two or more languages see Article 33 of the Vienna Convention on the Law of Treaties, which reads:

- '1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'

¹³¹ The words in quotation are taken from the observations by the Israeli delegate at the 11th Session of the Conference, 163rd plenary meeting, para. 61, *Off. Rec.*, vol. 16. To the same effect see USA, A/CONF.62/SR.136 (1980), para. 128, *ibid.*, vol. 14. See also Treves, *loc. cit.* above (p. 192 n. 118), p. 75. *Per contra*, the Colombian delegate pointed out that with respect to Article 320, 'if doubts of interpretation arose, Article 33 of the Vienna Convention on the Law of Treaties, and especially paragraph 3 of that article, should be applied': A/CONF.62/SR.165 (1982), para. 60, *Off. Rec.*, vol. 16.

drawn up'.¹³² In his reply, Sir Humphrey Waldock (the Special Rapporteur) observed that it was inadvisable to lay down a general rule providing an automatic solution where two or more authentic texts could not be reconciled. He further contended that 'it was impossible to say in advance that the text in which the treaty had been drafted should necessarily prevail, for the defects of that text might be the source of the difficulty'.¹³³ It is in this characteristically careful response of Sir Humphrey Waldock that one may find the reason why a rule in favour of the basic or original text was not embodied in Article 33 of the Vienna Convention on the Law of Treaties. This rationale is especially relevant to the Convention on the Law of the Sea.¹³⁴

¹³² Verdross had made similar observations elsewhere: see e.g. *Annuaire de l'Institut de Droit International*, 43 (i) (1950), p. 456. See also Bulgaria, Committee of the Whole, 34th meeting, para. 54, *Official Records of the United Nations Conference on the Law of Treaties*, First Session (1968).

¹³³ *Yearbook of the ILC*, 1966, vol. 1, pt. 2, 874th meeting.

¹³⁴ A case in point is the use of the word 'facilities' in the English text (see A/CONF.62/L.56, *Off. Rec.*, vol. 13). Some examples of this usage with the equivalents in the French, Russian and Spanish texts can be cited:

Article 18, para. 1

English text

'Passage means navigation through the territorial sea for the purpose of:

- (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
- (b) proceeding to or from internal waters or a call at such roadstead or port facility.'

French text

'On entend par "passage" le fait de naviguer dans la mer territoriale aux fins de:

- (a) la traverser sans entrer dans les eaux intérieures ni faire escale dans une rade ou une installation portuaire située en dehors des eaux intérieures; ou
- (b) se rendre dans les eaux intérieures ou les quitter, ou faire escale dans une telle rade ou installation portuaire ou la quitter.'

Russian text

'Под проходом понимается плавание через территориальное море с целью:

- (a) пересечь это море, не заходя во внутренние воды или не становясь на рейде или у портового сооружения за пределами внутренних вод; или
- (b) пройти во внутренние воды или выйти из них или стать на таком рейде или у такого портового сооружения.'

Spanish text

'Se entiende por paso el hecho de navegar por el mar territorial con el fin de:

- (a) Atravesar dicho mar sin penetrar en las aguas interiores ni hacer escala en una rada o una instalación portuaria fuera de las aguas interiores; o
- (b) Dirigirse hacia las aguas interiores o salir de ellas, o hacer escala en una de esas radas o instalaciones portuarias o salir de ella.'

Article 21, para. 1 (b)

English text

'The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

- (b) the protection of navigational aids and facilities and other facilities or installations . . .'

French text

'L'État côtier peut adopter, en conformité avec les dispositions de la Convention et les autres règles du droit international, des lois et règlements relatifs au passage inoffensif dans sa mer territoriale, qui peuvent porter sur les questions suivantes:

- (b) protection des équipements et systèmes d'aide à la navigation et des autres équipements ou installations . . .'

The arbitral tribunal in the *Young Loan* arbitration made some pertinent comments on the question of resort to 'the basic or original text'. It took the view that

the habit occasionally found in earlier international practice of referring to the basic or original text as an aid to interpretation is now, as a general rule, incompatible with the principle incorporated in Article 33 (1) of the Vienna

Russian text

‘Прибрежное государство может принимать в соответствии с положениями настоящей Конвенции и другими нормами международного права законы и правила, относящиеся к мирному проходу через территориальное море, в отношении всех нижеследующих вопросов или некоторых из них:

(b) защиты навигационных средств и оборудования, а также других сооружений или установок . . .’

Spanish text

‘El Estado ribereño podrá dictar, de conformidad con las disposiciones de esta Convención y otras normas de derecho internacional, leyes y reglamentos relativos al paso inocente por el mar territorial, sobre todas o algunas de las siguientes materias:

(b) La protección de las ayudas a la navegación y de otros servicios e instalaciones . . .’

Article 125, para. 3

English text

‘Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interests.’

French text

‘Dans l’exercice de leur pleine souveraineté sur leur territoire, les États de transit ont le droit de prendre toutes mesures nécessaires pour s’assurer que les droits et facilités stipulés dans la présente partie au profit des États sans littoral ne portent en aucune façon atteinte à leurs intérêts légitimes.’

Russian text

‘Государства транзита в осуществление своего полного суверенитета над своей территорией имеют право принимать все меры, необходимые для обеспечения того, чтобы права и возможности, предусмотренные в настоящей Части для государств, не имеющих выхода к морю, никоим образом не ущемляли законных интересов государства транзита.’

Spanish text

‘Los Estados de tránsito, en el ejercicio de su plena soberanía sobre su territorio, tendrán derecho a tomar todas las medidas necesarias para asegurar que los derechos y facilidades estipulados en esta parte para los Estados sin litoral no lesionen en forma alguna sus intereses legítimos.’

Article 128

English text

‘For the convenience of traffic in transit, free zones or other customs facilities may be provided at the ports of entry and exit in the transit States, by agreement between those States and the land-locked States.’

French text

‘Pour faciliter le trafic en transit, des zones franches ou d’autres facilités douanières peuvent être prévues aux ports d’entrée et de sortie des États de transit, par voie d’accord entre ces États et les États sans littoral.’

Russian text

‘Для удобства транзитного движения могут быть предусмотрены беспошлинные зоны или другие таможенные льготы в портах входа и выхода в государствах транзита по соглашению между этими государствами и государствами, не имеющими выхода к морю.’

Spanish text

‘Para facilitar el tráfico en tránsito, podrán establecerse zonas francas u otras facilidades aduaneras en los puertos de entrada y de salida de los Estados de tránsito, mediante acuerdo entre estos Estados y los Estados sin litoral.’

The ambiguity resulting from the variety of meanings which can be attributed to the word ‘facilities’ in the English text has created in this respect a ‘defect’ in the original text of the Convention on the Law of the Sea which can only be remedied by resort to the other authentic texts.

Convention on the Law of Treaties, of the equal status of all authentic texts in pluri-lingual treaties . . . The international maxim of the special importance or precedence—whatever form it may take—of the original text would relegate the other authentic texts again to the status of subordinate translations.¹³⁵

Though these observations have attracted criticisms¹³⁶ they nevertheless constitute an important interpretation of Article 33 of the Vienna Convention on the Law of Treaties.

According to the Vienna Convention on the Law of Treaties, the terms of a treaty are presumed to have the same meaning in each authentic text. It must be assumed that this presumption can be rebutted or indeed strengthened by the circumstances attending the drafting of the particular instrument.¹³⁷

It is here that the whole procedure adopted by the Drafting Committee of the Third UN Conference on the Law of the Sea becomes most relevant. The Drafting Committee and its subsidiary organs spent a considerable amount of time on language concordance. As has already been remarked, each language group had an opportunity not only to examine the text in its own language but also to harmonize that text with others.¹³⁸ More importantly, all delegations attending the Conference could participate in the business of the Drafting Committee and its subsidiary organs.¹³⁹ As a consequence the Arabic, Chinese, French, Russian and Spanish texts are not mere translations of the English text.¹⁴⁰ This fact alone strengthens the presumption that the terms of the Convention in the various language texts have the same meaning, and to that degree weakens whatever special status the English text might have enjoyed as being in the 'original language'.¹⁴¹

¹³⁵ 59 ILR 529-30.

¹³⁶ The dissenting opinion was particularly strong in arguing against this point: 59 ILR 578-85. To the same effect see Rosenne, loc. cit. above (p. 190 n. 106), p. 769 and Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn., 1984), pp. 151-2.

¹³⁷ Hardy noted that 'the strength of the presumption in favour of the original version depends on the circumstances in which the other versions were drawn up. It will be weak if the negotiators all participated directly in the elaboration of those texts; stronger if they only exercised partial control over it, as, for example, by entrusting the task to a small drafting committee; and decisive if they left the entire job of drawing up those texts to one of the parties or to some specified body. Since the drafting process may assume any one of the many varied forms, the evidential value of the original text tends to depend on the facts of each case': loc. cit. above (p. 192 n. 119), p. 105.

¹³⁸ See p. 174 above.

¹³⁹ In addition the Committee had before it a multilingual text which incorporated some of the various negotiating texts. On the significance of this point see further Gyorgy Haraszti, *Some Fundamental Problems of the Law of Treaties* (Akademai Kiado-Budapest, 1973), p. 184.

¹⁴⁰ In previous law-making conferences convened by the General Assembly there was no such mechanism for ensuring concordance of the different language versions of the Convention. In particular the preparation of the Chinese and Russian versions of the text was the responsibility of the Secretariat. See the memorandum by the Secretariat, A/CN.4/187. See too Rosenne, *The Law of Treaties—a Guide to the Legislative History of the Vienna Convention* (1970), pp. 70-1.

¹⁴¹ Cf. these observations: 'What is significant is that the strength of the presumption in favour of the original English use of "depreciated" is particularly great because here the negotiators *did not participate* in the translation process. On the contrary the entire task of drafting the authentic non-English texts was left to the translation section, which in turn could rely on the glossaries prepared

In the view of this writer the unique procedure adopted by the Drafting Committee may also have the effect of giving added importance to the comparison of the authentic texts as a means of interpretation, perhaps even to a greater extent than is envisaged in the Convention on the Law of Treaties itself.¹⁴²

XI. SOME CONCLUDING OBSERVATIONS

The work of the Drafting Committee of the Third UN Conference on the Law of the Sea contained several novel and important features. Particularly noteworthy was the establishment of the language groups. These groups, which were initially designed simply to widen participation in the Committee, came to play a pivotal role in the work of the Committee. It was around the language groups that the Drafting Committee constructed the machinery which enabled it, among other things, to provide an effective response to the challenge of producing texts of the Convention on the Law of the Sea of equal authenticity in six languages. The procedure adopted by the Drafting Committee has made a notable contribution to law-making in the modern international community and the work of the Committee as represented in its documentation remains, it is submitted, of enduring importance for the interpretation of the Convention on the Law of the Sea.

by it for use in translating' (emphasis added): *Young Loan* arbitration, dissenting opinion of Messrs Robinson, Bathurst and Monguilan, 59 ILR 584.

¹⁴² The Vienna Convention on the Law of Treaties does not treat the question of comparing the authentic texts as one of the principal means of interpreting a multilingual treaty. The question was, however, discussed in the ILC. See *Yearbook of the ILC*, 1966, vol. 1, pt. 2, 874th meeting, paras. 7-25 and para. 35. It is significant that the tribunal in the arbitration between Canada and France in the *Dispute concerning Filleting within the Gulf of St Lawrence* resorted, *inter alia*, to a comparison of the six authentic texts with respect to Article 62, para. 4 (a), of the Convention on the Law of the Sea. This examination supported the tribunal's general conclusion that 'the regulation of filleting at sea cannot a priori be justified by coastal State powers under the new law of the sea rules': see paras. 52 and 53 of the Award of 17 July 1986.

THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION*

By P. R. GHANDHI¹

I. INTRODUCTION

THE International Covenant on Civil and Political Rights and the Optional Protocol thereto, adopted by the General Assembly of the United Nations in Resolution 2200A (XXI)² of 16 December 1966, entered into force on 23 March 1976 in accordance with Articles 49 of the Covenant and 9 of the Protocol respectively. As at 25 July 1986, there were eighty-three States parties to the Covenant and thirty-seven States parties to the Protocol.

The Covenant established the Human Rights Committee as the principal international organ of its implementation. This body consists of eighteen individuals serving in their personal capacity.³ The members of the Human Rights Committee are elected by secret ballot by the States parties to the Covenant. Each State may nominate not more than two persons who must be nationals of the nominating State.⁴ In the election of the Committee, consideration must be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.⁵ As to qualification (other than nationality), the Covenant provides that members of the Committee 'shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience'.⁶

A member of the Human Rights Committee is not the representative of the State of which he is a national and which has nominated him. The Covenant provides, in Article 35, that members of the Human Rights Committee shall receive emoluments from UN resources. This is a factor which strengthens the *de facto* independence of a Committee member. This principle is further emphasized in Article 38 which states: 'Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously'.

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¹ MA (Oxon.), LL.M (Lond.), Solicitor of the Supreme Court; Lecturer in Law, University of Reading.

² UN Doc. A/6316.

³ Article 28.

⁴ Article 29. Professor Rosalyn Higgins, QC, is the current UK member and the only woman serving on the Committee at present.

⁵ Article 31 (2). At the very first election, this principle resulted in the election of 5 members from Western Europe, 4 from Eastern Europe, 2 from Asia, 3 from Africa, 1 from North America and 3 from Latin America.

⁶ Article 28 (2).

In accordance with Articles 28–32 of the Covenant, the States parties, at their first meeting held on 20 September 1976 at UN Headquarters,⁷ elected by secret ballot the eighteen members of the Human Rights Committee from a list of persons nominated by the States parties. The States parties decided that the term of office of the members of the Committee should begin on 1 January 1977. The regular term of office of the members of the Committee is four years. However, in accordance with Article 32 (1) of the Covenant, the Chairman of the first meeting of the States parties chose by lot the names of nine members of the Committee whose terms were to expire at the end of two years, in order to avoid a complete change of membership at any one time.

The Covenant, plus the Optional Protocol to it, provides for three distinct procedures as measures of implementation.⁸ In each of these procedures the Committee plays a pivotal role. First, the Committee's function is to study reports submitted by the States parties, in accordance with Article 40 (1), and to transmit *its* reports, and such general comments as it may consider appropriate, to the States parties. It may also transmit these general comments to the Economic and Social Council of the UN, along with the copies of the reports it has received from the States parties.⁹ It is significant that this is the only activity of the Committee

⁷ For decisions adopted at the first meeting, see the *Official Records of the First Meeting of States Parties to the International Covenant on Civil and Political Rights* (CCPR/SP.7).

⁸ A mass of literature exists on the measures of implementation contained in the Covenant. The following are particularly useful: Robertson, 'The Implementation System: International Measures', in Henkin (ed.), *The International Bill of Rights—The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981); Pathak, 'The Protection of Human Rights', *Indian Journal of International Law*, 18 (1978), p. 265; Robertson, *Human Rights in the World* (Manchester University Press, 1982); Capotorti, 'The International Measures of Implementation included in the Covenants on Human Rights', in Eide and Schou (eds.), *Proceedings of the Nobel Symposium on the International Protection of Human Rights* (Stockholm, 1967); Mower, 'Organising to Implement the UN Civil/Political Rights Covenant: First Steps by the Committee', *Human Rights Review*, 3 (1978), p. 122; id., 'Implementing United Nations Covenants', in Said (ed.), *Human Rights and World Order* (Transaction Books, 1978); id., 'The Implementation of the U.N. Covenant on Civil and Political Rights', *Human Rights Journal*, 10 (1977), p. 271; Ramcharan, 'Implementing the International Covenants on Human Rights', in Ramcharan (ed.), *Human Rights Thirty Years after the Universal Declaration* (Martinus Nijhoff, 1979); Das, 'Institutions et procédures issues des conventions relatives aux droits de l'homme . . .', in Vasak (ed.), *Les Dimensions internationales des droits de l'homme* (UNESCO Manual, 1978); Schwelb, 'The United Kingdom signs the Covenants on Human Rights', *International and Comparative Law Quarterly*, 18 (1969), p. 457; id., 'The U.K. and the International Covenants on Civil and Political and Economic, Social and Cultural Rights', *Human Rights Review*, 2 (1977), p. 89; id., 'Civil and Political Rights: The International Measures of Implementation', *American Journal of International Law*, 62 (1968), p. 827; Shelton, 'The Optional Protocol to the International Covenant on Civil and Political Rights', in Hannum (ed.), *Guide to International Human Rights Practice* (Macmillan Press, London, 1984). See also 'U.N. Human Rights Covenants become Law: so what?', *Proceedings of the American Society of International Law*, 1976, p. 97.

⁹ Article 40 (4). See in particular, on the operation of the reporting system, Fischer, 'Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee', *American Journal of International Law*, 76 (1982), p. 142; Jhabvala, 'The Practice of the Covenant's Human Rights Committee, 1976–82: Review of the State Party Reports', *Human Rights Quarterly*, 6 (1984), p. 81. See also the Annual Reports of the Human Rights Committee since 1977 for the lists of reports by State parties and their contents. See also the Report issued in March 1985 by Justice commenting on the UK's second Periodic Report to the Human Rights Committee under the

to which States are *automatically* subject on becoming parties to the Covenant.

Secondly, the Committee is competent to consider communications from a State party which considers that another State party is not giving effect to the provisions of the Covenant. In such a case, it must make available its good offices to the States parties concerned with a view to a friendly solution of the matter. This capacity can be exercised by the Committee only if *both* States concerned have declared that they recognize its competence to receive and consider such communications from States parties.⁹ The operative principle is thus one of reciprocity. Furthermore, this procedure only became applicable when ten States parties accepted this competence of the Committee. As at 25 July 1986, eighteen such declarations of acceptance had been lodged with the Secretary-General of the UN. Other functions in regard to these inter-State allegations are performed by an *ad hoc* conciliation commission. The whole optional inter-State communication procedure is regulated in detail by Articles 41 and 42 of the Covenant.¹⁰

Generally, one can say that the proceedings are complex, delicate and long-winded. They are based on the goodwill of States. They can be terminated by either State party to the dispute before the *ad hoc* conciliation commission has been appointed. If an *ad hoc* conciliation commission is agreed upon by both States, the respondent State is still entirely free to accept or reject the contents of the report of the *ad hoc* conciliation commission. Commenting generally on inter-State proceedings in international human rights law, Professor John P. Humphrey was provoked to say:

To give a state the right to complain that another state is violating human rights is one of the weakest techniques for enforcing human rights law. . . . The individual whose rights have been violated has no guarantee that any state will in fact sponsor his case. Indeed, it is unlikely that, unless there is some political motivation for doing so, states will interfere with what is happening in other countries, particularly if their relations with them are friendly.¹¹

Thirdly, in regard to States parties to the Optional Protocol, the Committee is competent to receive and consider communications from *individuals* who claim to be victims of a violation by a State which is a party *both* to the Covenant and to the Protocol of any of the rights set forth in the Covenant. When dealing with communications from individuals the Committee's task is not to offer its good offices, but to 'forward its views

International Covenant on Civil and Political Rights. The UK's second Periodic Report may be found in *General Assembly Official Records* (hereinafter *GAOR*), 40th Session, Supplement 40, Report of the Human Rights Committee, p. 97.

¹⁰ On the theoretical operation of this system, see in particular the literature referred to at p. 202 n. 8, above.

¹¹ 'The International Law of Human Rights in the Middle Twentieth Century', in Bos (ed.), *The Present State of International Law and Other Essays* (Deventer, 1973), p. 75 at p. 86.

to the State party concerned and to the individual'.¹² It is *this* procedure of international individual communication, in which the Committee plays a crucial role, that is to be the subject of detailed scrutiny in this paper.¹³

It is quite a major step forward to give one State *locus standi* to complain about the treatment by another State of its own nationals. Nevertheless, the inter-State communication procedure under the Covenant has yet to be invoked. This is, of course, in stark contrast to the experience of the Strasbourg institutions under the European Convention on Human Rights, 1950, which has produced eighteen inter-State cases, seventeen of which have been declared admissible by the European Commission.¹⁴ But it must be pointed out that this *only* represents about 3½ per cent of the 492 cases in total declared admissible by the Commission as of 1 January 1987. Accordingly, even under the European Convention, the great preponderance of admitted cases (96½ per cent) have been individual applications.

Why then has the Covenant inter-State procedure not been invoked at all, whereas the Strasbourg institutions have some significant experience of such invocation? The answer seems to lie in the fact that, generally, the procedure for inter-State complaints under the European Convention system is substantially the same as in the case of an individual application. It is true that there are one or two differences. In particular, not all the grounds of inadmissibility which apply to an individual application apply to an inter-State case. For example, the grounds in Article 27 (1) and (2) do not apply to States. Also, at an operational level, it is far more likely that an inter-State complaint, assuming it is declared admissible by the Com-

¹² Article 5 (4) of the Optional Protocol.

¹³ It is interesting to note that the Covenant does not require that members of the Committee be nationals of a State which is also a party to the Optional Protocol. Therefore, nationals of States which have not accepted this optional arrangement *will* participate in the Committee's procedures under the Protocol.

¹⁴ These eighteen cases can be considered as six complexes:

- (1) Two brought by Greece in 1956/7 against the UK concerning the situation in Cyprus: *Yearbook of the European Convention on Human Rights*, 2 (1958-9), pp. 182 and 186.
- (2) One by Austria against Italy in 1960: *ibid.* 6 (1963), pp. 742 and 796.
- (3) Three identical applications lodged in 1967 against Greece by Denmark, Norway and Sweden and one substantially the same by The Netherlands; in 1970 a further application against Greece was lodged jointly by Denmark, Norway and Sweden: *ibid.* 11 (1968), pp. 690 and 737; *ibid.* 12 (1969), p. 108; *ibid.* 13 (1970), p. 122; and *Decisions and Reports of the European Commission of Human Rights*, vol. 6, p. 5.
- (4) Two lodged by Ireland against the UK in December 1971 and March 1972: *Yearbook of the European Convention on Human Rights*, 15 (1972), pp. 92 and 255, *European Court of Human Rights*, Series B, vol. 23-I, and Series A, No. 25. The second application by Ireland submitted under Article 7 of the Convention was withdrawn following an undertaking by the UK Government that there would be no prosecution of offences under the Northern Ireland Act 1972 for acts or omissions which occurred prior to the enactment of that Act.
- (5) Two lodged by Cyprus against Turkey in September 1974 and March 1975. In 1977 a further application was lodged by Cyprus against Turkey: see *Decisions and Reports of the European Commission of Human Rights*, vol. 2, p. 125, and *ibid.*, vol. 13, p. 85.
- (6) Five lodged by Denmark, France, The Netherlands, Norway and Sweden against Turkey in July 1982 (case nos. 9940-44/82), declared admissible by the Commission on 6 December 1983. These cases have now been settled.

mission, will ultimately be pronounced upon by the Committee of Ministers under Article 32 of the Convention. To date, only one inter-State complaint, *Ireland v. UK*, has reached the European Court of Human Rights. By contrast, the inter-State procedure under the Covenant is completely different from, more complex and far weaker than the individual communication procedure under the Optional Protocol. Under the Optional Protocol, the Committee is entitled to state, and always has stated, whether or not particular breaches of the Covenant are revealed when making known its views under Article 5 (4) of that document. However, under the inter-State procedure the *ad hoc* conciliation commission (assuming the complaint gets this far) can only, when it draws up its report, 'embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter' (Article 42 (7) (c) of the Covenant). The States concerned are then completely free to accept or reject the terms of such a report.

Ultimately, given the likely continued non-invocation of the Covenant's inter-State dispute settlement procedure, the success of the international measures of protection will be gauged by whether or not the individual communication procedure, in which the Committee plays the fundamental role, will provide an effective international remedy to an individual whose rights under the Covenant have been violated. While it is not appropriate at this stage of the paper to offer any detailed evaluation of the work of the Committee in its task of seeing that the rights of the individual are not breached, it may be suggested tentatively that the impartial, conscientious and quasi-judicial attitude adopted by the Committee has won it respect from both States and individuals alike.

II. THE FIRST STEPS IN THE IMPLEMENTATION PROCESS

As constituted, the Human Rights Committee held two sessions in 1977. The first was held at UN Headquarters from 21 March to 1 April 1977. The second session was held at the UN Office at Geneva from 11 to 31 August 1977. Several decisions of a fundamental nature, in relation to the right of individual communication, were taken by the Committee at these sessions. First, the Committee adopted its own provisional rules of procedure, in accordance with the terms of Article 39 (2) of the Covenant. Secondly, the Committee discussed its method of work in relation to consideration of individual communications. Thirdly, the Committee established, in accordance with rule 89 of its provisional rules of procedure, a Working Group of five of its members to meet at Geneva from 9 to 13 January 1978, with a view to making recommendations to the Committee regarding the fulfilment of the conditions of admissibility laid down in Articles 1, 2, 3 and 5 (2) of the Protocol.¹⁵

¹⁵ GAOR, 32nd Session, Supplement 44, Report of the Human Rights Committee, pp. 4-5.

(a) *Establishment of Provisional Rules of Procedure*¹⁶

In order to facilitate the task of the Committee, the Secretary-General of the UN had prepared draft provisional rules.¹⁷ These draft rules were considered by the Committee at both sessions. At its first session, the Committee adopted those provisional rules of procedure comprising 'General Rules' (rules 1 to 65) and 'Reports from States parties under Article 40 of the Covenant' (rules 66 to 71). Importantly for the purposes of this paper, it also adopted a number of rules concerning 'Consideration of Communications received under the Optional Protocol' (rules 78 to 86 and 88).

Some of these latter rules relate to the question of the *transmission* of communications to the Committee. It is interesting to observe that these rules confer on the Secretary-General important powers on receipt of communications which are, or seem to be, submitted for consideration by the Committee under Article 1 of the Protocol. From a political point of view, it is vital that the Human Rights Committee be seen to be part of the *whole* apparatus of the UN machinery for the international protection of human rights and not merely as an organ of the Covenant. From a practical point of view, the Secretary-General is in the unique position of being the original recipient of the communications and is thus best placed to conduct certain preliminary tasks and so facilitate the subsequent work of the Committee. Nevertheless, he ought not to trespass on the province of the Committee. Accordingly, although his actions are primarily of an administrative and technical nature and should not involve decisions concerning the admissibility of communications, he may solicit clarifications from authors, both where it is unclear whether an author intends his communication to be submitted to the Committee or not, and where the information furnished by an author appears to be insufficient (rules 78 and 80).

In addition to preparing regularly lists of communications containing brief summaries of their contents (rule 79), the Secretary-General must circulate to members of the Committee a summary of the relevant information obtained by him during his preliminary enquiries (rule 81). In this way, the Committee should have before it a working document, including comprehensive fact sheets, concerning each communication submitted for consideration.

It is significant to note that, after some discussion, the Committee also adopted rule 86, which provides that the Committee may inform a State party of its views on whether interim measures may be desirable to avoid irreparable damage to a victim of an alleged violation. In arrogating to itself the right to make such an interlocutory order, the Committee gave

¹⁶ These are set out in full in *ibid.*, pp. 48-66, as Annex II. See also Bossuyt, 'Le Règlement intérieur du comité des droits de l'homme', *Revue belge de droit international*, 14 (1978-9), p. 104.

¹⁷ CCPR/C/L.2 and Add. 1 and 2.

itself an immensely valuable tool which, in theory at least, could prove a formidable weapon in the task of deterring a State from taking further punitive measures, once an applicant has already lodged a communication and is thus in a particularly vulnerable position. One can only speculate on whether the Committee will eventually be able to make effective use of this rule (which some members felt went beyond the power conferred on the Committee under the Optional Protocol).¹⁸

In practice, the issue of interim measures has most often arisen in relation to the health of the alleged victim. In *Altesor v. Uruguay*¹⁹ the authors, who had submitted an application on behalf of their detained father, alleged that in view of their father's very poor state of health, interim measures should be taken (in order to avoid irreparable damage to their father's health and life). The Committee responded by asking the Government concerned for information concerning the state of health of the alleged victim, when requesting its views on admissibility. When the Government objected to admissibility, it made no reference to the alleged victim's state of health. The Committee deplored this lack of information and urged Uruguay to arrange an urgent medical examination by a competent authority and to furnish a copy of the medical report so obtained. Some three months later, Uruguay reported on the general medical condition of Mr Alberto Altesor. A further six months later a medical report was received by the Committee who forwarded a copy to the authors. Again, at the merits stage, the Committee asked for further up-to-date medical information on Mr Altesor. Ten months later, Uruguay provided a further medical bulletin and declared it was willing to carry out any subsequent medical examinations and treatment which might be necessary. Ultimately, in adopting its final views under Article 5 (4) of the Protocol, the Committee urged Uruguay to ensure that Mr Altesor received all necessary medical care.

A similar situation arose in *Sendic v. Uruguay*.²⁰ However, in this instance, Uruguay completely ignored the Committee's repeated requests for information concerning Mr Sendic's state of health and the medical treatment given him. In formulating its final views, the Committee added the rider that Uruguay must also ensure that the alleged victim received all necessary medical care promptly.

Accordingly, it seems that the experience to date does not reveal any great degree of success where interim measures have been indicated. However, the defect would seem to lie not in the substance of the rule, but in the attitude of States towards compliance with the requests of the Committee. It seems probable that as the Committee gains the confidence of States, so the degree of compliance will increase.

At its second session, the Committee discussed and adopted further

¹⁸ See below, under heading (b) 'The Method of Work . . .', in section II, for a discussion as to *when* such interim measures of protection may be stipulated.

¹⁹ Comm. no. R.2/10.

²⁰ Comm. no. R.14/63.

provisional rules relating to the *admissibility* of communications. One important question which arose for discussion was whether a petitioner should be obliged to submit a communication within a stipulated period after the exhaustion of domestic remedies (prescribed in Article 5 (2) (b) of the Protocol).²¹ It was decided that for the present at least, no time limits would be imposed. This was indeed a wise decision. It is hardly conceivable that the rules of procedure are likely to be known to the public at large in various countries. The imposition of a time limit in these circumstances would be an intolerable burden on the petitioner. By way of comparison, it is interesting to note that Article 26 of the European Convention on Human Rights imposes a time-limit of six months in this respect.

Furthermore, assuming that someone other than the alleged victim should be entitled to lodge a communication, which all members agreed upon, the question arose of formulating in a rule who that person could be and under what circumstances such a communication could be admissible. It was decided that, normally, the communication should be submitted by the individual himself or by his representative. However, a communication submitted on behalf of an alleged victim by *others* might be considered when it appeared that he was unable to submit the communication himself (rule 90 (1) (b)).²² This decision is to be welcomed. It gives a wide and generous ambit of interpretation to the provisions of Article 1 of the Protocol.²³ Equally, it deals adequately with the problem of providing an effective right of communication to detainees who might otherwise be prevented by their governmental authorities from lodging a communication. It had been argued previously by some members of the Committee that a person submitting a communication on behalf of an alleged victim had to be *authorized* to do so. This was rightly rejected as being too restrictive, since it eliminated entirely the possibility of submitting a communication on behalf of an alleged victim who was unable, for reasons beyond his control, to submit it himself or to authorize another person to act on his behalf.

A dispute arose within the Committee as to whether it could consider a communication where the application of the remedies, not only on the national level but also on the *international* level, was unreasonably prolonged. The origins of this dispute lay in the drafting of Article 5 (2) of the Protocol. This reads as follows:

²¹ '2. The Committee shall not consider any communication from an individual unless it has ascertained that:

...

(b) The individual has exhausted all available domestic remedies . . .'

²² See below, under heading (a) 'Who can be the Author of a Communication?', in section III, for the requisite criteria applicable in such a case.

²³ 'A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.'

2. The Committee shall not consider any communication from an individual unless it has ascertained that:
 - (a) The same matter is not being examined under another procedure of international investigation or settlement;
 - (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

The conflict of opinion within the Committee arose out of a difference of interpretation of the last sentence of Article 5 (2). Should it be read in conjunction with the *whole* of the preceding sentence, which combined both sub-paragraphs (a) and (b)? The Legal Counsel of the UN stated that in his view the last sentence ought to be construed as applying to *both* sub-paragraphs (a) and (b). Ultimately, members of the Committee agreed with this analysis and rule 90 (2), as adopted, coincides with this interpretation. Accordingly, the Committee will have jurisdiction to admit a communication whenever the procedures of *international investigation or settlement* (as well as domestic remedies) have proved to be unreasonably prolonged. Here again, the Committee is to be applauded for adopting the wider rather than the narrower construction, which had been urged by some.

The Committee also had to consider its attitude to pre-admissibility observations from the State party alleged to be in violation of the norms of the Covenant. It agreed that, although it was under no obligation to transmit the text of the communication to the State party concerned at the initial stage of the procedure, nevertheless no communication ought to be declared admissible unless the State party concerned had received the text of the communication and had been given an opportunity to furnish information or observations relevant to the question of admissibility (rule 91 (2)).

However, there was a difference of opinion as to whether to provide in the *rules* for time-limits for the receipt of the additional information or observations on admissibility and if so, what time-limits. Here the Committee had to face the delicate issue of reconciling two conflicting demands. On the one hand, there was the need for the Committee to act as expeditiously as possible, and on the other, the need to offer the State concerned enough time to prepare considered replies (rather than simply proffer blanket denials). Allied to this problem was the need to involve the Secretariat in the role of obtaining the observations on admissibility, particularly in view of the possible delays which these procedural requirements would entail, because of the long intervals between Committee sessions. Rule 91 (1), as finally adopted, reflected the consensus that for the sake of flexibility the Committee ought not to stipulate for precise time-limits in the rules themselves, but ought instead only to indicate a time-limit within which such further information or observations on

admissibility should be delivered to avoid unnecessary delay. Furthermore, the rule also empowers the Secretary-General to obtain these observations, etc., on behalf of the Committee, whenever requested to do so by the Committee itself, or by an appropriately constituted working party.²⁴

The last major bone of contention, in formulating rules on admissibility, lay in a difference of opinion about the circumstances in which the Committee might *reconsider* a previously taken decision to declare a communication inadmissible. Some members of the Committee took a wide view and considered that the Committee ought to have the power to review any decision in favour of inadmissibility taken on any ground, including the grounds outlined in Article 3 of the Protocol, viz. anonymity, abuse of the right of submission or incompatibility with the provisions of the Covenant. However, a more restrictive view finally prevailed. Rule 92 (2), as drafted, only authorized the Committee to *reconsider* its decision in favour of inadmissibility if requested to do so in writing by the applicant, and only if the reasons for inadmissibility under Article 5 (2) of the Protocol no longer applied, viz. that the same matter was no longer being examined by another international body or that domestic remedies had, since the original decision on admissibility, been exhausted. It is a pity that the Committee did not see fit to adopt the wider formulation since this would have given it greater flexibility, and it is desirable that the Committee should have the power to reconsider a case where an author has failed to plead a breach of a right contained in the Covenant, but could easily have done so if properly advised.

The Committee also discussed rules governing *consideration* of communications at its second session. Several points need to be stressed here. The Committee agreed that there should be no hard and fast time-limit, imposed by the rules of procedure, within which an author could comment on the post-admissibility statements made by the State party against which a claim had been lodged. This time-limit was left entirely to the discretion of the Committee (rule 93 (3)). Such flexibility is certainly desirable, since the circumstances in which a petitioner may find himself are infinitely variable.

Whether or not members of the Committee should be at liberty to append their individual or dissenting opinions to the view of the majority of the Committee, under Article 5 (4) of the Protocol, caused considerable diversity of opinion.²⁵ Ultimately, the Committee decided that an individual member could request that a *summary* of his individual opinion be attached to the views of the Committee when they are communicated to

²⁴ See below, under heading (c) 'Commencement of Consideration . . .', in section II, for the decision of the Committee that, normally, a time-limit of six weeks ought to apply to pre-admissibility observations. This limit has since been extended to eight weeks: see *GAOR*, 40th Session, Supplement 40, Report of the Human Rights Committee, p. 7.

²⁵ 'The Committee shall forward its views to the State Party concerned and to the individual.'

the individual and to the State party concerned (rule 94 (3)).²⁶ Some protests were voiced that the publication of dissent would weaken the authority of the Committee. However, it is suggested that, far from weakening the opinion of the majority, the ability to publish dissent will strengthen the quasi-judicial nature of the Committee, particularly so, perhaps, where an individual member holds that particular breaches of the Covenants are disclosed, contrary to the beliefs of the majority.²⁷

The Committee also considered what its position should be if the author of a communication subsequently wished to withdraw it. Was the Committee in duty bound to consider the communication despite the purported withdrawal, with a discretion to continue or discontinue consideration in the light of all information received? Or did the wish of the author to withdraw override the competence of the Committee to consider the communication? The decision that finally emerged was that no specific rule was needed. The Committee could reconsider the issue later, after it had gained more experience. It is interesting to observe, by way of comparison, that under the procedures of the European Convention on Human Rights, 1950, the applicant in *Tyrer v. UK*²⁸ was *refused* leave to withdraw an admitted application by the European Commission on Human Rights. Accordingly, the European Court of Human Rights then proceeded to pronounce on the conformity of judicial corporal punishment with Article 3 of the Convention, which outlaws 'torture or . . . inhuman or degrading treatment or punishment'. The real difficulty here is in determining whether a communication has been *voluntarily* withdrawn or withdrawn under pressure. In view of the inherent risk of State pressure of various kinds to withdraw, the Committee would perhaps have strengthened the right of individual communication by adopting the bolder and more protectionist attitude displayed by the European Commission in the *Tyrer* case.

An examination of the provisional rules as a whole calls for several concluding comments. Generally, the Committee has seen fit to draft rules that are both generous to the applicant and fair to the State against which a communication has been lodged. The Committee had to tread carefully in a matter which went to the heart of what was, formerly, exclusively within a State's own domestic jurisdiction. It has done so. It has displayed the essential even-handedness of approach which was crucial to foster both the confidence of the applicant that his claim would be dealt with impartially and expeditiously, and that of the State that it would receive a fair hearing. The draft rules successfully tread this fine line and the Committee is to be warmly congratulated. Whether this delicate balance is

²⁶ This privilege has been resorted to fairly regularly. See, e.g., the cases of: *Santullo*, *Grille Motta*, *Celiberti de Casariego*, *Lovelace*, *Lopez Burgos*, *Hertzberg*, *A.M.* and *A.D.*, all discussed later in the paper at various stages, and *Muteba*.

²⁷ e.g. as in the cases of *Santullo* and *Lovelace*, discussed below.

²⁸ ECHR, Series A, No. 26 (1978). See comments by Bonner, *Modern Law Review*, 42 (1979), p. 580, and Zellick, *International and Comparative Law Quarterly*, 27 (1978), p. 665.

maintained in the developing jurisprudence of the Committee will be examined later in this paper. It is also important to stress that the rules drafted are only *provisional* rules. They are, thus, capable of amendment in the light of the future experience of the Committee. This was a far-sighted precaution.

(b) *The Method of Work in relation to the Handling of Individual Communications*

At its second session, Committee members discussed, in public session, a number of questions mainly (but not exclusively) relating to the *handling* of communications at the *admissibility* stage. Some important matters were considered. Committee members felt that, although the principle of confidentiality should govern their deliberations when dealing with communications, a minimum of information about cases of admissibility *under consideration* should be made available in the report of the Committee without disclosing the contents of the communications, the nature of the allegations, the identity of the author or the name of the allegedly infracting State party. Only such limited and basic information as was commensurate with the legitimate interest of the public at large in knowing the main trends of the decisional process of the Committee should be made available at *this* stage. Of course, the Committee must 'hold closed meetings when examining communications under the . . . Protocol' (Article 5 (3) of the Protocol). Confidentiality *during* deliberation is thus mandatory by the terms of the Optional Protocol.

Committee members also took pains to point out that the Secretary-General ought to adopt a liberal interpretation in deciding which communications should be forwarded to the Committee under the Optional Protocol for its consideration, since this was an entirely new procedure which would need a number of years for the public to become fully acquainted with it. Indeed, the Secretariat was pressed to take the initiative when appropriate, and advise an author as to the propriety of addressing his communication to the Committee. Furthermore, if there was any doubt, Committee members felt that the Secretariat should seek further information from the author in accordance with rule 80. In addition, the Secretary-General should, it was agreed, under rule 80, notify authors, where appropriate, that the Committee could only consider violations of the Covenant occurring *on* or *after* the entry into force of the Covenant and the Protocol for the State party concerned *unless* the alleged violations, although occurring before that date, continued to have effects which themselves constituted a violation after that date. This instruction was issued in the light of experience arising from the Committee's being asked to consider, at its second session, a number of communications which concerned violations which allegedly occurred *only before* entry into force of the requisite instruments for the State party concerned.

Committee members also agreed that (although the provisional rules did not deal with the subject) authors should be free to lodge communications in the language of their choice and that the Secretariat should, within ten to twenty days, respond with a formal acknowledgement of receipt to authors in the *same* language as the initial communication. If a communication was received in a language other than a working language of the Committee, a full translation should be made of it. Clearly these developments are matters of fundamental importance from the point of view of the author and thus are to be welcomed.

An important point of procedure in the application of interim measures of protection under rule 86 was clarified by the Committee. It decided that, in the interests of speed, the possibility of the imposition of interim measures in respect of any particular communication should not be dependent on the prior inclusion of that communication on the lists of communications drawn up under rule 79 by the Secretary-General, and submitted to the Committee for its attention under rule 78. This was a particularly important decision from the petitioner's point of view, since it will enable the Committee, where appropriate, to adopt protective measures at a very early stage in the proceedings.

Finally, the Committee agreed to publish its final decisions made under Article 5 (4) of the Protocol. However, some members warned that the Committee should proceed with caution in this respect and avoid any action which might discourage member States from ratifying the Covenant or becoming parties to the Protocol. The Committee has also decided that it will normally make public also all final decisions declaring a communication *inadmissible*, substituting initials for the names of the alleged victim(s) and the author(s). This decision to publish its final decisions under Article 5 (4) of the Protocol was of crucial importance, since it is only through publicity given to the developing case law that an individual can properly vindicate his rights in international human rights law. Furthermore, publication of final decisions on admissibility is also of great significance because it is only through such decisions that a petitioner will know whether or not his communication will be admissible. This is obviously of fundamental importance. Equally, the comments and criticisms by international lawyers, inspired by the open law-reporting of the decisions, which develop both the substantive rights and procedural provisions in the Covenant and Protocol, can only enhance the prestige of the Committee and engender confidence in its procedures from the point of view of both individuals and States alike. It is only in this way that the implied pledge of impartial objectivity by the Committee can be redeemed.

In sum, these further decisions on the handling of petitions taken by the Committee show a balanced and careful appraisal of its role in the international adjudication process on human rights violations.

(c) *Commencement of Consideration of Individual Communications*

The advent of its second session heralded the fulfilment of one of the Committee's principal roles in implementing the Covenant. First, it began to consider individual communications received in accordance with the provisions of the Protocol. Of course, at such an early stage, the Committee was only competent to begin to consider the admissibility issue in a number of cases, advised as appropriate by the Working Group's recommendations.

Secondly, in its discretion, the Committee decided that normally a six weeks' time-limit for the submission of information and observations relevant to the question of admissibility under rule 91 (1) would apply. This limit has since been extended to eight weeks. A further four weeks' time-limit was set for the submission by either party of comments on the information or observations obtained. Bearing in mind the usual dilatoriness with which governments tend to deal with human rights issues and the fact that many petitioners may be detainees (and their mail subject to scrutiny or stoppage), these time-limits still seem to be quite severe. However, they do ensure that the wheels of the Protocol machinery keep turning, especially in cases where time is of the essence. It seems, therefore, that the right balance has been struck.

In general, these decisions indicate a promising start to the individual communication procedure. Whether these trends have been consolidated and further developed in the emerging jurisprudence of the Committee will be considered next.

III. SOME ASPECTS OF THE JURISPRUDENCE OF THE COMMITTEE UNDER THE OPTIONAL PROTOCOL

The general trend of the emerging case law²⁹ of the Committee is most promising. This is not, of course, to say that various criticisms cannot be made in some areas. The Committee has displayed a determined desire to be seen to be acting in, at least, a quasi-judicial manner. Its impartiality is beyond doubt. It has been scrupulously fair to both petitioners and States parties. Within the confines of this impartiality, it has generally displayed a willingness to veer toward a liberal interpretation of the Covenant and the Protocol in favour of the alleged victim, whenever more than one inter-

²⁹ There is, as yet, far less literature on the concrete case law of the Committee than there is on the theoretical aspects of the measures of implementation. On the former, see, in particular, Nowak, 'The Effectiveness of the International Covenant on Civil and Political Rights—Stocktaking after the first eleven sessions of the U.N. Human Rights Committee', *Human Rights Law Journal*, 1 (1980), p. 136; Tomuschat, 'Evolving Procedural Rules: The U.N. Human Rights Committee's First Two Years of Dealing with Individual Communications', *ibid.*, p. 249; Nowak, 'UN Human Rights Committee: Survey of Decisions given up till July 1981', *ibid.*, 2 (1981), p. 168; *id.*, 'UN Human Rights Committee: Survey of Decisions given up till October 1982', *ibid.*, 3 (1982), p. 207; *id.*, 'UN Human Rights Committee: Survey of Decisions given up till July 1984', *ibid.*, 5 (1984), p. 199; *id.*, 'UN Human Rights Committee: Survey of Decisions given up till July 1986', *ibid.*, 7 (1986), p. 287; Graefrath, 'Trends Emerging in the Practice of the Human Rights Committee', *Bulletin of the GDR Committee for Human Rights*, no. 1/80 (1980), p. 3.

pretation has been possible. Such an attitude is welcomed and can only enhance the prestige of the UN organs generally in their efforts to ensure an even greater measure of protection to individuals in public international law. The ensuing analysis will illustrate the nature and breadth of the Committee's decisions on communications lodged by individuals. However, for reasons of space, this analysis will concentrate on the extraction of some of the more important pronouncements of *principle* by the Committee.³⁰

(a) *Who can be the Author of a Communication?*

Article 1 of the Protocol states that the Committee can receive communications from individuals who claim to be victims of violations of rights set forth in the Covenant. This does not mean that the individual must sign the communication himself in every case. He may also act through a duly appointed representative. However, there may be other cases in which the author of the communication may be accepted as having the necessary authority to act on behalf of the alleged victim. Accordingly, the normal position is that 'the communication should be submitted by the individual himself or by his representatives' (e.g. the alleged victim's lawyers). Exceptionally, 'the Committee may . . . accept to consider a communication submitted on behalf of an alleged victim when it appears that he is unable to submit the communication himself',³¹ as where he has been detained.

The case law of the Committee illustrates its approach to this question. It regards a close family connection to be a link which justifies an author in acting on behalf of an alleged victim. As a corollary of this, it will not consider communications where the author fails to demonstrate any genuine link between himself and the alleged victim. In *Massera v. Uruguay*,³² the author petitioned on behalf of herself, her husband, her mother and her stepfather, José Luis Massera (an internationally renowned mathematician). The Committee decided that the 'author of the communication was justified by reason of close family connexion in acting on behalf of the other alleged victims'.³³ The cases are replete with examples of communications submitted by close relatives and others being admissible.³⁴

³⁰ The reader should consult the variously cited Reports of the Human Rights Committee for full details of factual situations and arguments, etc., giving rise to the issues of principle.

³¹ Rule 90 (1) (b).

³² Comm. no. R.1/5.

³³ GAOR, 34th Session, Supplement 40, Report of the Human Rights Committee, p. 126.

³⁴ It is interesting to note that J. L. Massera, who was arrested by the Uruguayan authorities in October 1975 on the grounds of 'subversive association', was finally released in March 1984. His plight was highlighted in a letter to *The Times* on 30 November 1982 by a group of eminent British mathematicians. However, the case of *Gomez de Voituret v. Uruguay* (Comm. no. 109/1981) is also particularly interesting because it was the first case in which a close relative of a person detained in Uruguay submitted a communication from *inside* the country.

In other cases, the Committee has found that the author of the communication lacked sufficient *locus standi* to submit a petition on behalf of others.³⁵ In *Grille Motta v. Uruguay*,³⁶ the author submitted a communication on his own behalf and on behalf of other persons who allegedly were not in a position to submit a communication on their own. The Committee decided to request the author to furnish further information on 'the grounds and circumstances justifying his acting on behalf of the other alleged victims mentioned in the communication'.³⁷ The author failed to respond to this request and therefore the Committee had no alternative but to declare the communication inadmissible in so far as it related to *other* alleged victims, because of the lack of relevant additional information from the author. This decision shows that the Committee requires some clear proof that an author is acting on behalf of others.

In the case of *U.R. v. Uruguay*,³⁸ the author was a member of a non-governmental organization (Amnesty International) and had taken an interest in the alleged victim's situation. He said he had been working on the case for two and a half years, without avail, and claimed to have the authority to act on behalf of U.R. because he believed 'that every prisoner treated unjustly would appreciate further investigation of his case by the Human Rights Committee'.³⁹ The Committee recalled its previous case law and declared the application inadmissible. It stated that it had 'established through a number of decisions on admissibility that a communication submitted by a third party on behalf of an alleged victim can *only* be considered if the author justifies his authority to submit the communication'.⁴⁰

The onus is thus clearly placed on the author.⁴¹ In *Mbenge v. Zaire*,⁴² the Committee held that the author had no authority to act on behalf of one particular alleged victim. In *A.D. v. Canada*⁴³ the Committee rejected the *locus standi* of the author to act on behalf of the alleged victim in the following way:

The Human Rights Committee observes that the author has not proved that he is authorized to act as a representative on behalf of the Mikmaq tribal society. In

³⁵ See *Hartikainen v. Finland*, Comm. no. R.9/40, and *D.F. v. Sweden*, Comm. no. 183/1984.

³⁶ Comm. no. R.2/11.

³⁷ GAOR, 35th Session, Supplement 40, Report of the Human Rights Committee, p. 133.

³⁸ Comm. no. 128/82. The present position is that communications are numbered consecutively, indicating also the year of registration. The numbering system was changed at the 18th Session of the Committee. Formerly, the reference number of each case consisted of the serial number of the case in the register, preceded by the number of the list of communications in which it was summarized and the letter 'R' indicating 'restricted' (e.g. R.18/73).

³⁹ GAOR, 38th Session, Supplement 40, Report of the Human Rights Committee, p. 239.

⁴⁰ Ibid. at p. 239.

⁴¹ See also *S.G.F. v. Uruguay* (Comm. no. 136/1983) and *J.F. v. Uruguay* (Comm. no. 137/1983).

⁴² Comm. no. 16/1977.

⁴³ Comm. no. 78/1980.

addition, the author has failed to advance any pertinent facts supporting his claim that he is personally a victim of a violation of any rights contained in the Covenant.⁴⁴

Thus the Committee has made it abundantly clear that, where the author himself is not the alleged victim, he must indicate the grounds and circumstances justifying his acting on behalf of the alleged victim. He must also include his reasons for believing that the alleged victim would approve the author's acting on his behalf and the author's reasons for believing that the alleged victim is unable to act on his own behalf. These criteria for adjudicating upon authorship, where the author is not the alleged victim, seem to strike the right balance between flexibility and the need to prevent the Protocol system from being overburdened by a mass of unauthorized communications.

Furthermore, the Committee has declared that an organization as such cannot submit a communication. In the case of *A Group of Associations for the Defence of the Rights of Disabled and Handicapped Persons in Italy etc. v. Italy*,⁴⁵ the authors of the communication were a non-governmental organization (Coordinamento) and the representatives of those associations, who claimed that they were themselves disabled or handicapped or that they were parents of such persons. Although the representatives were primarily acting for Coordinamento, they also claimed to act on their own behalf. The Committee declared:

According to Article 1 of the Optional Protocol, only individuals have the right to submit a communication. To the extent, therefore, that the communication originates from the 'Coordinamento', it has to be declared inadmissible because of lack of personal standing.⁴⁶

Similarly, in *J.R.T. and the W.G. Party v. Canada*,⁴⁷ the Committee stated that the W.G. Party (which was in fact an unincorporated political party under the leadership of J.R.T.) was 'an association and not an individual, and as such cannot submit a communication to the Committee under the Optional Protocol'.⁴⁸ Accordingly, the communication was inadmissible under Article 1 of the Optional Protocol in so far as it concerned the W.G. Party.

These cases seem to strike the right balance between allowing the maximum possible scope for petitioners who, for one reason or another, are unable to act on their own initiative and, on the other hand, allowing the Optional Protocol procedure to be swamped by a deluge of unauthorized communications. This is done by placing the onus of proving that he is acting for an alleged victim on the author. This seems fair. Particularly where the victim may wish to lodge a petition in one forum and the petitioner in fact lodges it in another, it seems appropriate

⁴⁴ GAOR, 39th Session, Supplement 40, Report of the Human Rights Committee, p. 202. The individual opinion of Mr Errera in this case raised further interesting questions. For details, see the report of the case.

⁴⁵ Comm. no. 163/1984.

⁴⁶ GAOR, 39th Session, Supplement 40, Report of the Human Rights Committee, p. 198.

⁴⁷ Comm. no. 164/1981.

⁴⁸ GAOR, 38th Session, Supplement 40, Report of the Human Rights Committee, p. 263.

that the victim should not be bound by the actions of an unrelated third party. However, the scope of legitimate authority under this procedure is far narrower than, for example, under the ECOSOC Resolution 1503 (XLVIII) procedure, which allows petitions from an author with only second-hand knowledge of violations provided he accompanies it with clear evidence and also allows petitions from non-governmental organizations in certain circumstances.

(b) *The Notion of the Victim*

Article 1 of the Protocol insists that potential petitioners must claim to be *victims* of a violation of the rights set forth in the Covenant. The Committee has declared that a person is not to be considered a victim unless he has been affected *personally* by a violation of the protected rights.⁴⁹ Accordingly, in the case of *Aumeeruddy-Cziffra and Nineteen Other Mauritian Women v. Mauritius*⁵⁰ (in which it was alleged that certain domestic legislation constituted, *inter alia*, discrimination based on sex against Mauritian women and was thus a breach of the Covenant), the Committee declared that:

A person can only claim to be a victim in the sense of Article 1 of the Optional Protocol if he or she is *actually*⁵¹ affected. It is a matter of degree how concretely this requirement should be taken. However, no individual can in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant. If the law or practice has not already been concretely applied to the detriment of that individual, it must in any event be applicable in such a way that the alleged victim's risk of being affected is more than a theoretical possibility.⁵²

Referring to the *Mauritian Women* case, the Committee endorsed its jurisprudence in *Hertzberg and others v. Finland*,⁵³ wherein it stated that it wished

to stress that it has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant, although such legislation may, in particular circumstances, produce adverse effects which directly affect the individual, making him thus a victim in the sense contemplated by Articles 1 and 2 of the Optional Protocol.⁵⁴

In the case of *A Group of Associations for the Defence of the Rights of Disabled and Handicapped Persons in Italy etc. v. Italy*,⁵⁵ the Committee expressed itself thus:

... the author of a communication must himself claim, *in a substantiated manner*,⁵⁶ to be the victim of a violation by the State party concerned. It is not the task of the

⁴⁹ See, e.g., *D.F. v. Sweden* (Comm. no. 183/1984).

⁵⁰ Comm. no. R.9/35.

⁵¹ Emphasis added.

⁵² GAOR, 36th Session, Supplement 40, Report of the Human Rights Committee, p. 139.

⁵³ Comm. no. R.14/61.

⁵⁴ GAOR, 37th Session, Supplement 40, Report of the Human Rights Committee, p. 164.

⁵⁵ Comm. no. 163/1984.

⁵⁶ Emphasis added.

Human Rights Committee, acting under the Optional Protocol, to review *in abstracto* national legislation as to its compliance with obligations imposed by the Covenant. It is true that, in some circumstances, a domestic law may by its mere existence directly violate the rights of individuals under the Covenant.⁵⁷

The Committee has thus gone out of its way to stress that it cannot examine abstract or potential breaches of the Covenant. A person must actually be a victim. This interpretation is necessitated by the strict terms of the Optional Protocol, which is in accord with other international instruments having the same purpose, e.g. the European Convention on Human Rights, 1950.⁵⁸ Furthermore, it would seem that any other interpretation would severely prejudice the successful operation of this particular method of implementation by attracting the criticism of States parties. Equally, such an interpretation will act as a potential filter and thus ensure that the task of the Committee is kept within reasonable bounds. Of course, under the inter-State procedure, States parties are given the role of *policing* the Covenant. They need not allege that their nationals are victims of a violation. It is enough to allege that the infractor State is violating the rights of its own inhabitants.

(c) *Operative Time of the Alleged Breaches*

In the very first case in which it formulated views under Article 5 (4),⁵⁹ the Committee rejected the communication as inadmissible in so far as it related to the author 'since it concerned events which allegedly took place prior to the entry into force of the Covenant and the Optional Protocol in respect of Uruguay'.⁶⁰ Accordingly, the Committee has often stated that it can only consider an alleged violation of human rights occurring *on or after* the date of entry into force of the Covenant and the Protocol for the State party concerned *unless* it is an alleged violation which, although occurring before that date, continues or has effects which themselves constitute a violation after that date.⁶¹ According to this case law, many communications (or parts of them) have been declared inadmissible *ratione temporis* because the alleged violations occurred prior to the entry into force of the Covenant and the Optional Protocol for the State party concerned.⁶² Inadmissibility *ratione temporis* is a feature common to other systems of international adjudication. For example, the case law of the European Commission is replete with decisions of inadmissibility on this ground. It also accords with the general rule of international law that a treaty does not create binding obligations for its participants until ratification or

⁵⁷ GAOR, 39th Session, Supplement 40, Report of the Human Rights Committee, p. 198. See the pronouncement in almost identical terms in *J.H. v. Canada* (Comm. no. 187/1985).

⁵⁸ See Article 25 of European Convention on Human Rights.

⁵⁹ *Massera v. Uruguay* (Comm. no. R.1/5).

⁶⁰ GAOR, 34th Session, Supplement 40, Report of the Human Rights Committee, p. 126.

⁶¹ Many cases have involved a continuing element. See, e.g., *Weinberger Weiss v. Uruguay* (Comm. no. R.7/28) and *Lovelace v. Canada* (Comm. no. R.6/24) for a complex example of continuing effect.

⁶² e.g. *M.A. v. Italy* (Comm. no. 117/1981).

accession, apart from those provisions which are declaratory of existing customary international law.

Generally, this issue is disposed of at the admissibility stage. However, this does not, of course, preclude the Committee from indicating in its final views under Article 5 (4) that 'the facts as found by the Committee, in so far as they continued or occurred after [the date on which the Covenant and the Optional Protocol entered into force for the State party concerned] disclose violations of various articles of the Covenant'.⁶³

(d) *The Concept of the Individual as Subject to a State Party's Jurisdiction*

According to Article 1 of the Optional Protocol, the Committee is only competent to consider a communication from an individual against a State party if he is 'subject to its jurisdiction'. On several occasions, the Committee has had to consider the meaning of this phrase. In *Viana Acosta v. Uruguay*,⁶⁴ the applicant, a Uruguayan national who at the time of filing his communication was living in Sweden, complained *inter alia* of his arbitrary arrest and detention by the authorities during the last few years of his residence in Uruguay. In its observations on admissibility, Uruguay submitted that in view of the above terms of Article 1 of the Protocol, it considered that the communication in question was inadmissible. In particular, Uruguay stressed that after he had been unconditionally released he went to live abroad and was therefore *not* subject to the jurisdiction. When discussing the question of admissibility, the Committee observed that the events complained of allegedly occurred in Uruguay while the author was subject to the jurisdiction of Uruguay. It recalled that by virtue of Article 2 (1) of the Covenant, each State party undertakes to respect and to ensure to 'all individuals within its territory and subject to its jurisdiction' the rights recognized in the Covenant: 'Article 1 of the Optional Protocol was clearly intended to apply to individuals subject to the jurisdiction of the State party concerned *at the time of the alleged violation of the Covenant*'.⁶⁵ This was manifestly the object and purpose of Article 1.⁶⁶ Hence, the Committee was able to dismiss this alleged ground of inadmissibility.

Similarly, in *Amendola Massiotti and Baritussio v. Uruguay*,⁶⁷ both the applicants were Uruguayan nationals, residing in the Netherlands and Sweden respectively, at the time their applications were lodged with the Committee. Both alleged massive violations of the Covenant, including arbitrary arrest and detention, committed by the governmental authorities in Uruguay against themselves. In its submissions under Article 4 (2) of

⁶³ *Llubeas v. Uruguay* (Comm. no. 123/1982), *GAOR*, 39th Session, Supplement 40, Report of the Human Rights Committee, p. 180.

⁶⁴ Comm. no. 110/1981.

⁶⁵ Emphasis added.

⁶⁶ *GAOR*, 39th Session, Supplement 40, Report of the Human Rights Committee, p. 171.

⁶⁷ Comm. no. R.6/25.

the Protocol,⁶⁸ Uruguay contended that there was no justification for the continued consideration of the case. It said:

The alleged victims were not under the jurisdiction of the State accused. To consider the communication further would therefore be incompatible with the purpose for which the Covenant and its Protocol were established, namely, to ensure the effective protection of human rights and to bring to an end any situation in which these rights were violated.

Uruguay concluded that 'in this case no *de facto* situation existed to warrant findings by the Committee, and that consequently, by intervening, the Committee would not only be exceeding its competence but would also be departing from normally established legal procedures'.⁶⁹ The Committee categorically rejected such an argument as being entirely misconceived. It stated:

With respect to the State party's submission under Article 4 (2) of the Optional Protocol that consideration of the communication should be discontinued, the Committee notes that the victims were under the jurisdiction of Uruguay while the alleged violations took place. The Committee therefore rejects the contention of the State party that further consideration of the case would be beyond its competence or contrary to the purposes of the International Covenant on Civil and Political Rights and the Optional Protocol thereto.⁶⁹

Such a robust view appears to be amply justified by the terms of the Optional Protocol. There can be little doubt that where a violation occurs towards an individual who was at *that* time residing in his country and subject to the jurisdiction of the State party concerned, he ought to be entitled to lodge a valid communication, notwithstanding that he is residing elsewhere at the time of lodgement. However, it must be stressed that all the cases just discussed have concerned persons who were still *nationals* of the State *in which* the violations actually took place at the time of the lodgement of the communications, although they were by then residing elsewhere. Thus there was no doubt that, at the time of the violations, they were both within the territory and subject to the jurisdiction of the State party concerned. The reports do not indicate whether these persons were *permanently* resident elsewhere at the time of lodgement. Given the interpretation of the Committee that the operative moment is *at the time when the alleged violation of the Covenant took place*, it follows inexorably that the Committee would still be competent to deal with the matter even if such persons had since taken up residence permanently elsewhere. This conclusion is in harmony with the position under the European Convention on Human Rights, under which as a

⁶⁸ 'Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.'

⁶⁹ GAOR, 37th Session, Supplement 40, Report of the Human Rights Committee, p. 190.

general rule the Convention is applicable *ratione loci* if the event or act which is the subject of the complaint has *taken place within the national boundaries* of a Contracting State.

What, however, is the position when the alleged violation of rights of a national of a State party occurs when that person is *not* residing in his country at the time of the alleged violation? Is a communication involving such a situation admissible? This question arose for consideration by the Committee in *Vidal Martins v. Uruguay*.⁷⁰ The applicant was a Uruguayan national who worked as a journalist residing in Mexico at the time of her communication. After several previous failed attempts to have her passport renewed by the Uruguayan consulate in both Paris and Mexico, the applicant requested a new passport from the consulate in Mexico in October 1978. This request was refused and caused her considerable practical difficulty. She complained, *inter alia*, of a violation of Article 12 (2) of the Covenant which reads: 'Everyone shall be free to leave any country, including his own.' The Human Rights Committee, on its own initiative, examined the question whether the fact that the petitioner resided abroad affected the competence of the Committee to receive and consider the communication under Article 1 of the Optional Protocol, taking into account the provisions of Article 2 (1) of the Covenant. Whereas Article 1 of the Optional Protocol (a procedural provision) declares that 'A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals *subject to its jurisdiction*'⁷¹ who claim to be victims of a violation . . .', Article 2 (1) of the Covenant (a substantive provision) by contrast imposes an *additional* requirement. It states that 'Each State party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory*'⁷¹ and subject to its jurisdiction the rights recognized in the present Covenant . . . '.

In an obscure passage, the Committee declared:

Article 1 of the Optional Protocol applies to individuals subject to the jurisdiction of the State concerned who claim to be victims of a violation by that State of any of the Covenant rights. The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is 'subject to the jurisdiction' of Uruguay for that purpose. Moreover, a passport is a means of enabling him 'to leave any country, including his own', as required by Article 12 (2) of the Covenant. It therefore follows from the very nature of the right that, in the case of a citizen resident abroad, it imposes obligations both on the state of residence and on the state of nationality. Consequently, Article 2 (1) of

⁷⁰ Comm. no. R.13/57. This issue had also arisen previously in the *Waksman* case (the facts being essentially the same as in *Vidal Martins*) but the Committee did not give the matter detailed consideration, preferring instead to make a peremptory declaration of admissibility. In any event, Uruguay informed the Committee in its observations under Article 4 (2) of the Protocol that a renewed passport had been delivered to the applicant (Comm. no. R.7/31).

⁷¹ Emphasis added.

the Covenant cannot be interpreted as limiting the obligations of Uruguay under Article 12 (2) to citizens within its own territory.⁷²

Although the motivation behind such a liberal interpretation of the Covenant and Protocol in favour of the applicant is laudable, its legal justification appears more dubious. Also, the reasoning of the Committee in arriving at such a solution is far from clear. However, it seems that the Committee was confining the conclusion that the wider procedural protection of the Protocol ('subject to its jurisdiction' *only*) overrode the narrow substantive scope of the Covenant ('*within its territory* and subject to its jurisdiction') to the case of refusal to grant a passport. Normally it would seem that, *logically*, the scope of the procedural protection *cannot* be greater than the scope of the substantive protection.

In *Angel Estrella v. Uruguay*,⁷³ the question arose whether a foreigner (an Argentinian national) resident in the territory of a State party in which alleged breaches of the Covenant had occurred in respect of him could be said to be 'subject to the jurisdiction' of that State. The Committee ruled in favour of the applicant, stating:

Article 1 of the Optional Protocol was clearly intended to apply to individuals subject to the jurisdiction of the State party concerned at the time of the alleged violation of the Covenant, irrespective of their nationality. This was manifestly the object and purpose of Article 1.⁷⁴

In *Lopez Burgos v. Uruguay*,⁷⁵ the question arose whether the phrase 'subject to its jurisdiction' included the acts of a State party's agents committed *abroad*. The author claimed that her husband, a Uruguayan national, had been kidnapped in Argentina by members of the Uruguayan security and intelligence forces and had been secretly detained there, before being clandestinely transported to Uruguay, where he had been arbitrarily detained in prison. In formulating its final views under Article 5 (4) of the Protocol the Committee observed:

. . . although the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of Article 1 of the Optional Protocol . . . or by virtue of Article 2 (1) of the Covenant . . . from considering these allegations together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil. The reference in Article 1

⁷² GAOR, 37th Session, Supplement 40, Report of the Human Rights Committee, p. 160. See also for confirmatory jurisprudence on this point the cases of *Lichtensztein v. Uruguay* (Comm. no. 77/1980), *Pereira Montero v. Uruguay* (Comm. no. 106/1981) and *Varela Nunez v. Uruguay* (Comm. no. 108/1981). The Committee expressed a similar view at its 21st Session when it declared communication no. 125/1982 admissible. It stated: 'The question of the issue of a passport by [the State party] to a national of [the State party] wherever he may be, is clearly a matter within the jurisdiction of [the State party's] authorities and he is "subject to jurisdiction" of [the State party] for that purpose.'

⁷³ Comm. no. 74/1980.

⁷⁴ GAOR, 38th Session, Supplement 40, Report of the Human Rights Committee, p. 156.

⁷⁵ Comm. no. R.12/52.

of the Optional Protocol to 'individuals subject to its jurisdiction' does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the state in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.⁷⁶

Accordingly, the kidnapping of Lopez Burgos had to be treated as an assertion of jurisdiction by Uruguay. The Committee added:

... Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another state, whether with the acquiescence of the Government of that state or in opposition to it. ... In line with [Article 5 (1) of the Covenant⁷⁷], it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory.⁷⁸

It is interesting to observe that Mr Tomuschat attached an individual concurring opinion to that of the Committee. He declared that 'in principle, the scope of application of the Covenant is not susceptible to being extended by reference to Article 5 . . .'.⁷⁹ This was contrary to the view taken by the Committee as a whole. However, he added that

... to construe the words 'within its territory' pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. ... Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity [of] their citizens living abroad.⁸⁰

It is illuminating to compare the jurisprudence of the Committee on territorial jurisdiction with that of the European Convention institutions. Here too, it seems that an individual who alleges that he is a victim need not in fact be within the territory of the State alleged to be in breach of its

⁷⁶ GAOR, 36th Session, Supplement 40, Report of the Human Rights Committee, p. 182.

⁷⁷ 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.'

⁷⁸ GAOR, 36th Session, Supplement 40, Report of the Human Rights Committee, p. 183.

⁷⁹ For his reasoning and interpretation of Article 5 of the Covenant see his individual opinion, *ibid.* at p. 184.

⁸⁰ *Ibid.* at p. 184. Precisely the same question arose in the case of *Celiberti de Casariego v. Uruguay* (Comm. no. R.13/56). On this point the Committee and Mr Tomuschat, respectively, adopted exactly similar reasoning.

Conventional obligations. In *X v. Austria*,⁸¹ a case which concerned the lawfulness of the arrest of the applicant carried out by Austrian authorities in Italy, the competence *ratione loci* of the Commission was not disputed, the application being dismissed for non-exhaustion of domestic remedies. In *Cyprus v. Turkey*,⁸² the Turkish Government argued that the applications ought to be declared inadmissible *ratione loci* since they related to alleged violations on Cyprus, because the Commission was only competent to examine acts committed in the *national* territory of the State concerned. Furthermore, Turkey had not extended her jurisdiction to Cyprus or any part of it. In dealing with this issue, the Commission interpreted the phrase 'within their jurisdiction' occurring in Article 1 of the Convention. The Commission held that this phrase was not limited to the *national* territory of the Contracting States. On the contrary, taking into account the phraseology of Article 1 and the purpose of the Convention as a whole, the rights enshrined in it had to be afforded to all persons under their *actual* authority and responsibility, whether that authority was exercised within their own territory or abroad. Furthermore, the Commission stressed that authorized agents of a State party, e.g. diplomatic and consular agents and armed forces, to the extent that they exercise authority abroad, do in fact bring persons or property within the jurisdiction of that State party. Accordingly, since Turkish armed forces had landed on Cyprus and operated there under the direction of the Turkish Government, they were authorized agents of Turkey and brought any other persons or property in Cyprus within the jurisdiction of Turkey to the extent that they exercised control over such persons or property.

(e) *Inadmissibility under Article 5 (2) (a) of the Optional Protocol*

Article 5 (2) states: 'The Committee shall not consider any communication from an individual unless it has ascertained that: (a) the same matter is not being examined under another procedure of international investigation or settlement.' Accordingly, the Committee cannot 'consider' any communication which is being examined simultaneously under any other international procedures of investigation or settlement, for example, under the Inter-American Commission on Human Rights (IACHR) or the European Commission of Human Rights.⁸³ In such cases, the Secretariat, on the instruction of the Committee, will notify the author

⁸¹ For the decision of February 1966, see *Yearbook of the European Convention on Human Rights*, 9 (1966), p. 458; for the decision of July 1966, see *ibid.*, p. 464, and *Collection of Decisions of the European Commission of Human Rights*, vol. 20, p. 79.

⁸² See *Yearbook of the European Convention on Human Rights*, 18 (1975), p. 82, and *Decisions and Reports of the European Commission of Human Rights*, vol. 2, p. 125.

⁸³ On overlapping generally, see Tardu, 'The Protocol to the United Nations Covenant on Civil and Political Rights and the Inter-American System: A Study of Co-existing Petition Procedures', *American Journal of International Law*, 70 (1976), p. 778, and Eissen, 'The European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights—Problems of Co-existence', *Buffalo Law Review*, 22 (1972), p. 181.

that the Committee has no competence to examine the matter. Most cases of overlapping jurisdiction have concerned the IACHR. The experience of the Committee in these cases is that the author has preferred to have the Committee examine his case and has accordingly withdrawn his petition from consideration by the IACHR. However, in one instance the author chose to withdraw his communication from the Committee in order that it could be considered by the European Commission of Human Rights.

Many difficult issues of interpretation in the terminology of Article 5 (2) (a) have had to be resolved by the Committee. For example, is the Committee prevented from considering a communication received by it when an unrelated third party has simultaneously lodged an application in respect of the same victim with another organ of international settlement? The Committee had to consider this question in *Altesor v. Uruguay*.⁸⁴ In this case, the authors (who were Uruguayan nationals living in Mexico) submitted an application on behalf of their father, Alberto Altesor, also a Uruguayan citizen, alleging *inter alia* that he had been arbitrarily detained by governmental authorities, to the IACHR in October 1976. They then submitted their father's case to the Committee on 10 March 1977. In March 1979, an unrelated third party lodged a complaint with the IACHR in respect of the treatment of Alberto Altesor. Subsequently, by letter dated 6 May 1980, the son and daughter withdrew their application on behalf of their father from the IACHR. There remained the outstanding petition to the IACHR by an unrelated third party. Did this constitute a bar to consideration by the Committee? The Committee concluded that 'it was not prevented from considering the communication submitted to it by the authors on 10 March 1977 by reason of the subsequent complaint made by an unrelated third party under the procedures of the IACHR'.⁸⁵

In the case of *Angel Estrella v. Uruguay*,⁸⁶ the Committee observed that the provisions of Article 5 (2) (a) of the Optional Protocol 'cannot be so interpreted as to imply that an unrelated third party, acting without the knowledge and consent of the alleged victim, can preclude the latter from having access to the Human Rights Committee'.⁸⁷ It therefore concluded that

... it was not prevented from considering the communication submitted to it by the alleged victim himself, by reason of a submission by an unrelated third party to the IACHR. Such a submission did not constitute the 'same matter', within the meaning of Article 5 (2) (a).⁸⁸

What constitutes 'the same matter' within the meaning of Article 5 (2) (a) has been the subject of several pronouncements by the Committee. In

⁸⁴ Comm. no. R.2/10.

⁸⁵ GAOR, 37th Session, Supplement 40, Report of the Human Rights Committee, p. 125.

⁸⁶ Comm. no. 74/1980.

⁸⁷ GAOR, 38th Session, Supplement 40, Report of the Human Rights Committee, p. 156.

⁸⁸ Ibid. See also *Celiberti de Casariego v. Uruguay* (Comm. no. R.13/56) for confirmatory jurisprudence on this point.

Millan Sequeira v. Uruguay,⁸⁹ the Committee held that 'the two-line reference to [the applicant] in [a case] before the Inter-American Commission on Human Rights—which case lists in a similar manner the names of hundreds of other persons allegedly detained in Uruguay—did not constitute the same matter as that described in detail by the author in his communication to the Human Rights Committee'.⁹⁰ In *Fanali v. Italy*,⁹¹ the Italian Government contended that the 'same matter' had been brought before the European Commission of Human Rights, since *other* individuals had brought their *own* cases before that body concerning claims which seemed to arise from the same incident (the so-called 'Lockheed Affair'). The Committee categorically rejected such an interpretation. It held that the concept of 'the same matter' within the meaning of Article 5 (2) (a) of the Optional Protocol had to be understood as 'including the *same*⁹² claim concerning the *same*⁹² individual, submitted by him or someone else who has the standing to act on his behalf before the other international body'.⁹³ Accordingly, since Italy itself recognized that the author of the communication before the Committee had not submitted his specific case to the European Commission of Human Rights, the Committee considered that the communication was not inadmissible.

The Committee has also decided that an examination of situations which 'appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms' in a particular country under ECOSOC Resolution 1503 (XLVIII)⁹⁴ does *not* constitute an examination of the 'same matter' as a claim by an individual submitted to the Committee under the Optional Protocol, within the meaning of Article 5 (2) (a) of the Protocol. Accordingly, the invocation of the ECOSOC resolution does not constitute a bar to the consideration of an *individual* case. This decision of the Committee is amply justified. In

⁸⁹ Comm. no. R.1/6.

⁹⁰ GAOR, 35th Session, Supplement 40, Report of the Human Rights Committee, p. 129.

⁹¹ Comm. no. 75/1980.

⁹² Emphasis added.

⁹³ GAOR, 38th Session, Supplement 40, Report of the Human Rights Committee, p. 163.

⁹⁴ On the Resolution 1503 procedure generally, see in particular: Moller, 'Petitioning the United Nations', *Universal Human Rights*, 1 (1979), p. 57; Humphrey, 'The Right of Petition in the UN', *Human Rights Journal*, 4 (1971), p. 463; Zuijdewijk, *Petitioning the United Nations* (St Martins Press, New York, 1982). On admissibility under the procedure, see Cassese, 'The Admissibility of Communications to the U.N. on Human Rights Violations', *Human Rights Journal*, 5 (1972), p. 275. On the procedure in particular, see Cassese, 'The New UN Procedure for Handling Gross Violations of Human Rights', *Comunità Internazionale*, 30 (1925), p. 49; Ermacora, 'Procedure to Deal with Human Rights Violations: A Hopeful Start in the UN?', *Human Rights Journal*, 7 (1974), p. 670; Guggenheim, 'Key Provisions of the UN Rules dealing with Human Rights Petitions', *New York University Journal of International Law and Politics*, 6 (1973), p. 427; Newman, 'The New United Nations Procedures for Human Rights Complaints: Reform, Status Quo, or Chambers of Horror?', *Annales de Droit*, 34 (1974), p. 129; Tardu, 'United Nations Response to Gross Violations of Human Rights: The 1503 Procedure', *Santa Clara Law Review*, 20 (1979), p. 559; Prasad, 'The Role of Non-governmental Organisations in the New United Nations Procedures for Human Rights Complaints', *Denver Journal of International Law and Policy*, 5 (1976), p. 441; Rodley, 'Monitoring Human Rights by the UN System and Non-governmental Organisations', in Kommers and Loescher (eds.), *Human Rights and American Foreign Policy* (University of Notre Dame Press, 1979); Wiseberg and Scoble, 'Monitoring Human Rights Violations: The Role of Non-governmental Organisations', *ibid.*

essence, there is no duplication or overlapping between the procedure regulated by the Council resolution and the Optional Protocol procedure, since the former does *not* aim to redress violations of the rights of any particular *individual*. Rather, the Resolution 1503 procedure, which is generally controlled by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and its parent body the Human Rights Commission, is concerned with gross violations of the rights of wide *groups* of people as in the case of the policy of *apartheid* in South Africa. No immediate remedy is afforded to *individuals*, as such, under the Resolution 1503 procedure. Hence it can be seen that the Committee is perfectly justified in refusing to consider the Council resolution as amounting to the 'same matter'.

In *Baboeram et al. v. Suriname*,⁹⁵ when declaring admissible a number of similar cases involving the utmost brutality, the Committee remarked that

... a study by an intergovernmental organization either of a human rights situation in a given country (such as that by the IACHR in respect of Suriname) or a study of the trade union rights situation in a given country (such as the issues examined by the Committee on Freedom of Association of the ILO in respect of Suriname), or of a human rights problem of a more global character (such as that of the Special Rapporteur of the Commission on Human Rights on summary or arbitrary executions), although such studies might refer to or draw on information concerning individuals, cannot be seen as being the same matter as the examination of individual cases within the meaning of Article 5, paragraph (2) (a) of the Optional Protocol. Secondly, a procedure established by non-governmental organizations (such as Amnesty International, the International Commission of Jurists or the International Committee of the Red Cross, irrespective of the latter's standing in international law) does not constitute a procedure of international investigation or settlement within the meaning of Article 5, paragraph (2) (a) of the Optional Protocol.⁹⁶

Finally, the question arises as to what the appropriate point in time is for adjudging if the 'same matter' is not being investigated under other international procedures. In *Torres Ramirez v. Uruguay*,⁹⁷ the Committee concluded that 'Article 5 (2) (a) of the Protocol did not preclude it from declaring the communication admissible, although the same matter had been submitted to another procedure of international investigation or settlement, if the matter had been withdrawn from and was no longer under active consideration in the other body at the time of the Committee's decision on admissibility'.⁹⁸ Thus the appropriate point in time is the moment when the Committee makes its decision on admissibility.

In general, the jurisprudence of the Committee under Article 5 (2) (a) of the Protocol narrowly confines the operation of the grounds of inadmissi-

⁹⁵ GAOR, 40th Session, Supplement 40, Report of the Human Rights Committee, p. 187.

⁹⁶ Ibid. at pp. 191-2.

⁹⁷ Comm. no. R.1/4.

⁹⁸ GAOR, 35th Session, Supplement 40, Report of the Human Rights Committee, p. 123.

bility stated in that article to situations where an appropriate *analogous* body (such as the IACHR or ECHR) is actively considering the 'same matter' at the time of the Committee's decision on admissibility.⁹⁹ This strict interpretation is in harmony with the terms of the Protocol itself and gives individuals the widest possible scope of access to the Committee. This is obviously desirable if the whole procedure is not to be thwarted or protection rendered illusory at the slightest semblance of *any other* international body being involved in the general situation in relation to which a particular breach or breaches of the Covenant are alleged by an *individual* with respect to *himself*.

(f) *The Operation of Reservations to Article 5 (2) (a) of the Protocol*

The competence of the Committee to consider petitions when the 'same matter' is not *being* examined under another procedure of international investigation is further narrowed in some cases by reservations entered to Article 5 (2) (a) of the Protocol by some States parties. In particular, Denmark, Iceland, Italy, Norway, France, Luxembourg, Spain and Sweden have made reservations which further preclude examination by the Committee of individual communications where the 'same matter' *has* already been examined in another procedure of international investigation. These reservations more fully circumscribe the competence of the Committee, since the formal terms of Article 5 (2) (a) only prevent the Committee from an examination of a communication *while* another process of international investigation is *being* conducted. These reservations mean that the Committee cannot consider *at all* any communication where the 'same matter' has already been examined in another international forum (the principle of *non bis in idem*). The obvious intent of the above mentioned States which have made such reservations is to prevent any possibility of appeal from any decisions of the Strasbourg institutions under the European Convention on Human Rights to the Human Rights Committee.¹⁰⁰

In the case of *A.M. v. Denmark*,¹⁰¹ the author had already submitted a communication concerning the 'same matter' to the European Commission of Human Rights, which had found it inadmissible as 'manifestly ill-founded' under Article 27 (2) of the European Convention.¹⁰² Thus, although there was technically nothing in Article 5 (2) (a) of the Protocol to prevent the Committee from considering the case, the effect of the Danish reservation (as delineated above) was to render the Committee

⁹⁹ See, e.g., the inadmissibility decision in *D.F. v. Sweden* (Comm. no. 183/1984).

¹⁰⁰ For the effects of the various international human rights instruments providing a mechanism for individual communications on the machinery of protection established under the European Convention on Human Rights, see the Secretariat Memorandum prepared by the Directorate of Human Rights (Doc. no. H(85)3).

¹⁰¹ Comm. no. R.26/121.

¹⁰² App. no. 9490/81, decision of 1 March 1982.

incompetent to deal with the matter. The Committee put its ruling on inadmissibility in this way:

In the light of the . . . reservation and observing that the same matter has already been considered by the European Commission of Human Rights and therefore by another procedure of international investigation within the meaning of Article 5 (2) (a) of the Optional Protocol to the International Covenant on Civil and Political Rights, the Committee concludes that it is not competent to consider the present communication.¹⁰³

In *O.F. v. Norway*,¹⁰⁴ the author had approached the European Commission of Human Rights with a view to lodging an application but had been informed that he was out of time since he had not submitted his application within six months of the date of exhaustion of domestic remedies in accordance with Article 26 of the European Convention. Subsequently, the State party itself informed the Committee that it would not object to the admissibility of the communication on the basis of its reservation, since it was unarguable that the case had not in fact been examined in Strasbourg at all for there had not even been a declaration of inadmissibility there. The case had not even been registered by the European Commission. The Committee agreed with this analysis since there was no room for any doubt.

Of course, States parties are free to enter such a reservation to Article 5 (2) (a), but it cannot be denied that such action does further delimit the competence of the Committee. Nevertheless, it is understandable that States parties which have also ratified the European Convention should not wish the final decisions of the Strasbourg bodies to be the subject of further scrutiny in New York or Geneva. Such further examination would, it seems, tend to weaken the authority of the European Commission or Court, as appropriate, especially if the Committee disagreed with the European institutions and came to the conclusion that a breach or breaches of rights covered in both instruments had occurred. Such a finding could be very embarrassing for the European organs. Furthermore, such reservations are generally in harmony with the terms of Article 27 (1) (b) of the European Convention which bars the Commission from handling applications which deal with matters that are substantially the same as those already submitted to another procedure of international investigation, e.g. the Human Rights Committee, unless it contains 'relevant new information'. Thus, in effect, appeals from any decision of, for example, the Human Rights Committee will *not* be entertained in Strasbourg unless new and relevant information, which was not before the Committee, is adduced.

However, it is suggested that in one respect the Committee took a very timid view in *A.M. v. Denmark*.¹⁰⁵ In this connection, it is worth studying

¹⁰³ GAOR, 37th Session, Supplement 40, Report of the Human Rights Committee, p. 213.

¹⁰⁴ Comm. no. 158/1983.

¹⁰⁵ Comm. no. R.26/121.

the dissenting view of Mr Bernhard Graefrath. He refused to share the view of the Committee as a whole that it was barred from considering the application because of the Danish reservation. He explained that the reservation referred only to matters which had already been *considered* under other procedures of international investigation. It did *not, in particular* refer to matters, the *consideration* of which had been *denied* under any other procedure by a decision of inadmissibility. The reason was that

[i]f the Committee interprets the reservation in such a way that it would be excluded from considering a communication when a complaint referring to the same facts has been declared inadmissible under the procedure of the European Convention, the effect would be that any complaint that has been declared inadmissible under that procedure could later on not be considered by the Human Rights Committee, despite the fact that the conditions for admissibility of communications are set out in a separate international instrument and are different from those under the Optional Protocol. . . . A decision on non-admissibility of the European Commission, therefore, has no impact on a matter before the Human Rights Committee and cannot hinder the Human Rights Committee from reviewing the facts of a communication on its own legal basis and under its own procedure and from ascertaining whether they are compatible with the provisions of the Covenant. This might lead to a similar result as under the European Convention, but not necessarily so.¹⁰⁶

Mr Graefrath's opinion is to be preferred to the view of the Committee as a whole, both because it is clear that the word 'considered' cannot include situations where the case has *not* been considered on the merits because of a ground of inadmissibility in another forum which might not be applicable under the Optional Protocol, and because there cannot be any fear of weakening the authority of the Strasbourg institutions where no final decision has been taken under the European Convention.

More recently, another spirited attempt to outflank the Norwegian reservation to Article 5, paragraph (2) (a), of the Protocol was made in *V.O. v. Norway*.¹⁰⁷ The Committee thus had a further opportunity to pronounce upon the meaning of the phrase 'the same matter'. It said: 'This phrase in the view of the Committee refers, with regard to identical parties, to the complaints advanced and facts adduced in support of them.'¹⁰⁸ The Committee thus found that the matter which was before the Committee now was in fact the same matter that was examined by the European Commission of Human Rights and hence inadmissible.

In essence, the applicant claimed that, with regard to the custody of his infant daughter by marriage, one-sided and biased decisions in divorce proceedings conducted before Norwegian courts had resulted in a *de facto* separation between himself and his child. Accordingly, he alleged that he

¹⁰⁶ *GAOR*, 37th Session, Supplement 40, Report of the Human Rights Committee, pp. 214-15.

¹⁰⁷ Comm. no. 168/1984; *GAOR*, 40th Session, Supplement 40, Report of the Human Rights Committee, p. 232.

¹⁰⁸ *Ibid.* at p. 235.

was a victim of violations of various provisions of the Covenant. An earlier application to the European Commission had been dismissed by that body as being manifestly ill-founded.

By concentrating on the general nature of the *complaints* advanced and *facts* adduced in support of them (in its analysis of 'the same matter') the Committee was able to ignore the arguments of the author that, first, the provisions of the European Convention pleaded before the European Commission differed in several respects from those of the Covenant invoked in the instant communication to the Committee; secondly, that breaches of certain additional Covenant rights other than those involved in the application to Strasbourg were involved, and thirdly, that his communication to the Committee in no sense amounted to an appeal against the European Commission's decision. Instead, the Committee preferred to adopt the argument of the government that the communication amounted to 'the same matter' since it referred to 'the same facts, no new events being submitted to the Committee, and because the legal arguments in the two proceedings [were] the same'.¹⁰⁹

Such reasoning, while having the advantage of simplicity, scarcely does justice to the main thrust of the petitioner's argument that where different rights, which were not alleged to have been violated before the European Commission, are pleaded under the Covenant or where the nature of the substantive rights in the Covenant differs from the formulation under the European Convention, the examination of the communication by the Committee cannot amount to the consideration of 'the same matter' already adjudicated upon by the European Commission. Whereas it is easy to criticize the decision of the Committee, not least because of the somewhat Delphic nature of its pronouncement, it is obvious that the Committee intended to demonstrate to States parties to both the European Convention and the Covenant, which had entered a reservation to Article 5, paragraph (2) (a), of the Protocol, that it would adopt a wider rather than a narrower interpretation of such a reservation in order to give it the maximum possible scope. No doubt the Committee wished both to assure States parties that their reservations would be respected and also to encourage those States such as the United Kingdom which have accepted the Article 25 individual application procedure under the European Convention but have not yet ratified or acceded to the Optional Protocol, 1966, to do so speedily, without fear that the decisions of the Strasbourg organs could in effect be appealed against in Geneva or New York.

(g) *Inadmissibility under Article 5 (2) (b) of the Optional Protocol*

Article 5 (2) of the Protocol states that '[t]he Committee shall not consider any communication from an individual unless it has ascertained that: . . . (b) the individual has exhausted all available domestic remedies'.

¹⁰⁹ Ibid. at p. 234.

Many cases have been declared inadmissible on this ground.¹¹⁰ In other cases, the Committee have considered the essential pre-conditions to the invocation of this ground of inadmissibility.

In the case of *Torres Ramirez v. Uruguay*,¹¹¹ the government objected to admissibility with the bald statement that 'the alleged victim had not exhausted all available domestic remedies'.¹¹² The Committee brushed aside such an unqualified assertion and informed the State party that

... in the absence of more specific information concerning the domestic remedies said to be available to the author of [the] communication, and the effectiveness of those remedies as enforced by the competent authorities in Uruguay, the Committee was unable to accept that he had failed to exhaust such remedies and the communication would therefore not be considered inadmissible in so far as exhaustion of domestic remedies was concerned, unless the State party gave details of the remedies which it submitted had been available to the author in the circumstances of his case, together with evidence that there would be a reasonable prospect that such remedies would be effective.¹¹³

Despite such a clear indication as to what was required, Uruguay responded with a general description of domestic remedies available but failed to specify which remedies were available to the author in the *particular* circumstances of *his* case. Accordingly, the Committee concluded:

... Article 5 (2) (b) of the Protocol did not preclude it from considering a communication received under the Protocol where the allegations themselves raise issues concerning the availability or effectiveness of domestic remedies and the State party, when expressly requested to do so by the Committee, did not provide details on the availability and effectiveness of domestic remedies in the particular case under consideration.¹¹⁴

Hence the Committee was able to consider the case on the merits. This jurisprudence was confirmed in *Millan Sequeira v. Uruguay*.¹¹⁵

Similarly, in *Grille Motta v. Uruguay*,¹¹⁶ the Committee decided to declare a communication admissible, since it was unable to conclude on the basis of the information before it that, with regard to the exhaustion of domestic remedies, there were any remedies which the alleged victim should or could have pursued. However, in this case the Committee warned that it was reserving the right to review its decision on admissibility 'in the light of any further explanations which the State party may submit giving details of any domestic remedies which it claims to have been available to the author in the circumstances of his case, together with

¹¹⁰ See, e.g., *J.S. v. Canada* (Comm. no. 130/1982) and *N.B. v. Sweden* (Comm. no. 175/1984). See also the article by Cançado Trindade, 'Exhaustion of Local Remedies under the UN Covenant on Civil and Political Rights and its Optional Protocol', *International and Comparative Law Quarterly*, 28 (1979), p. 734.

¹¹¹ Comm. no. R.1/4.

¹¹² GAOR, 35th Session, Supplement 40, Report of the Human Rights Committee, p. 122.

¹¹³ Ibid. at pp. 122 and 123.

¹¹⁴ Ibid. at p. 123.

¹¹⁵ Comm. no. R.1/6. See also later cases such as *Dermitt Barbato v. Uruguay* (Comm. no. 84/1981), *Marais v. Madagascar* (Comm. no. 49/1979), *Oxandabarat Scarrone v. Uruguay* (Comm. no. 103/1981) and *Gomez de Voituret v. Uruguay* (Comm. no. 109/1981).

¹¹⁶ Comm. no. R.2/11.

evidence that there would be a reasonable prospect that such remedies would be effective'.¹¹⁷ This decision again reflects the desire of the Committee to be seen to be acting impartially and to be offering the State party every opportunity to submit evidence on the application of domestic remedies. Furthermore, it is firmly based on the text of rule 93 (4) of the provisional rules which states: 'The Committee may review its decision that a communication is admissible in the light of any explanation or statements submitted by the State Party pursuant to this rule.' This rule was invoked for the first time in the case of *C.F. et al. v. Canada*,¹¹⁸ wherein the Committee reversed its previous decision in the light of new evidence and made a declaration of inadmissibility.

In *Weinberger Weisz v. Uruguay*,¹¹⁹ the Committee made a declaration of admissibility on the basis that, on the information before it at that stage, there were no further domestic remedies which the alleged victim could have pursued.¹²⁰ Uruguay pressed non-exhaustion of domestic remedies when asked for written explanations on the merits under Article 4 (2) of the Optional Protocol. However, the Committee decided that since more than four and a half years had passed since the arrest of the applicant and still no final judgment on the legality of his detention had been delivered by the appropriate organ, it was not barred from considering the case on the merits since 'the application of the remedy [was] unreasonably prolonged'.¹²¹ In making this decision, the Committee was able to invoke the last sentence of Article 5 (2) (b) which states, *inter alia*, that this bar to admissibility 'shall not be the rule where the application of the remedies is unreasonably prolonged'.

In the case of *Baboeram et al. v. Suriname*,¹²² all the petitioners openly admitted that they had not exhausted domestic remedies because it was clear that, in the political situation then existing there, there were *no* effective legal remedies, and they submitted some evidence in support. The State party did not challenge the authors' contention that there were no effective legal remedies to exhaust. The Committee recalled that 'it had already established in numerous other cases that exhaustion of domestic remedies could be required only to the extent that these remedies were effective and available within the meaning of Article 5, paragraph 2 (b), of the Optional Protocol'.¹²³ Accordingly, the Committee was not barred

¹¹⁷ GAOR, 35th Session, Supplement 40, Report of the Human Rights Committee, p. 134. In *Martinez Machado v. Uruguay* (Comm. no. 83/1981), the Committee found no reason to review its decision on admissibility since no further details had been provided by the State party under Article 4 (2) of the Protocol of the remedies available and the prospects of their effectiveness.

¹¹⁸ Comm. no. 113/1981; GAOR, 40th Session, Supplement 40, Report of the Human Rights Committee, p. 217. See also *J.H. v. Jamaica* (Comm. no. 165/1984).

¹¹⁹ Comm. no. R.7/28. See also, among others, *Buffo Carballal v. Uruguay* (Comm. no. R.8/33) on this point.

¹²¹ GAOR, 36th Session, Supplement 40, Report of the Human Rights Committee, p. 118. See also *Solorzano v. Venezuela* (Comm. no. 156/1983).

¹²² GAOR, 40th Session, Supplement 40, Report of the Human Rights Committee, p. 187.

¹²³ *Ibid.* at p. 192. The requirement that domestic remedies must be effective and available entails that procedural guarantees of a 'fair and public hearing by a competent, independent and impartial tribunal' must be scrupulously observed: see *Gilboa v. Uruguay* (Comm. no. 147/1983).

from making a declaration of admissibility. That domestic remedies must, in principle, be available and effective before exhaustion is required is commensurate with the generally recognized rules of international law.

In *Pietraroia v. Uruguay*,¹²⁴ the Committee stated that to require resort to remedies of an 'exceptional nature' would unreasonably prolong the exhaustion of domestic remedies, and it doubted their applicability. This case laid the foundations for the view that extraordinary remedies are not required to be exhausted. In *Cubas Simones v. Uruguay*,¹²⁵ the Government objected to admissibility because it claimed that, although the ordinary appeals procedure had been completed by the applicant who alleged, *inter alia*, arbitrary detention, there still remained certain 'extraordinary' remedies¹²⁶ which had not been exhausted. However, this objection was disregarded by the Committee because the Government had failed to show why these extraordinary remedies should be pursued and they had not been invoked by the officially appointed defence counsel. Accordingly, they could not be regarded as being 'available' within the meaning of Article 5 (2) (b) of the Protocol.¹²⁷ The Government further pursued its arguments on non-exhaustion when giving explanations on the merits under Article 4 (2) of the Protocol. It suggested that the applicant had applied for 'conditional release' and no decision had yet been reached by the Court. The Committee said that this procedure did not amount to a 'remedy' within the meaning of Article 5 (2) (b) of the Protocol. Although extraordinary remedies, because of their limited scope, are not in general required to be exhausted before a declaration of admissibility can be made, especially where the petitioner has been led to believe that there were no further remedies, the case of *Muhonen v. Finland*¹²⁸ is authority for the proposition that there can be a declaration of inadmissibility for failure to exhaust extraordinary remedies if the State party can show that there were grounds for believing that such a remedy could be or could have been effective in the particular circumstances of the case.

Finally, it is interesting to note that in *C.F. et al. v. Canada*,¹²⁹ the Committee left open the question of whether a domestic remedy which was established *after* the submission of a communication to the Committee needs to be resorted to in order to comply with the terms of Article 5 (2) (b) of the Protocol.

The case law of the Committee on exhaustion of local remedies is forthright, confirmatory and aims to grant to the author every reasonable possibility that his communication will be examined on the merits. The State party is, at least, required to point to remedies in its domestic law that both are applicable and afford to the author a reasonable prospect of success before a declaration of inadmissibility can be made. It is then up to

¹²⁴ Comm. no. R.10/44.

¹²⁵ Comm. no. R.17/70.

¹²⁶ Those of 'annulment' and 'review'.

¹²⁷ See also *Teti Izquierdo v. Uruguay* (Comm. no. R.18/73) and *Campora Schweizer v. Uruguay* (Comm. no. 66/1980) for confirmation of this jurisprudence.

¹²⁸ Comm. no. 89/1981.

¹²⁹ Comm. no. 113/1981.

the petitioner to prove exhaustion, or that exhaustion is not required because, for example, there are no effective remedies to be exhausted, or that he is relieved from the duty to exhaust because, for example, the application of the remedies is unreasonably prolonged. If the Committee is in any doubt about the exhaustion of local remedies through lack of information from the State party concerned, it has the power to review its decision when dealing with the merits of the communication. This gives to States every opportunity to furnish information relevant to admissibility even at a very late stage.

On the issue of burden of proof in exhaustion of domestic remedies, it is interesting to examine the position of the European Human Rights Convention institutions by way of comparison.¹³⁰ In the original rule 41 (2) of the rules of procedure of the European Commission of Human Rights adopted on 2 April 1955, the issue of burden of proof in exhausting domestic remedies under Article 26 of the Convention was put in this way: 'In pursuance of Article 26 of the Convention a party shall provide evidence to show that all domestic remedies have been exhausted.' In a series of decisions from 1955 until 1959, the Commission followed the principle that it was for the applicant to prove that he had exhausted all domestic remedies. Accordingly, it held that substantial evidence of compliance with the rule must be adduced.¹³¹ This interpretation was criticized as being too onerous and at variance with the position in general international law which imposes the burden of proof on the particular party alleging a fact. In other words, there is a division of the burden of proof—whichever party makes an assertion is under an obligation to prove it.¹³² Furthermore, the Commission itself had taken a more liberal approach in inter-State cases.¹³³

In 1960, the rule of procedure regarding burden of proof was revised. The amended rule 41 (2) stated: 'The applicant shall provide information enabling it to be shown that the conditions laid down in Article 26 of the Convention have been satisfied.' No longer has the applicant to provide substantive evidence of exhaustion. All that is required is *prima-facie* evidence. According to Trindade, the new rule

lends support to the shifting or division of the burden of proof between the contending parties before the Commission. Thus with regard to Article 26 of the Convention, it lays upon the respondent party the initial burden of proving the existence of local remedies to be exhausted; the burden then shifts to the applicant

¹³⁰ The leading monograph on exhaustion of domestic remedies generally in international law (including under the European Convention and other human rights instruments) is Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge University Press, 1983).

¹³¹ See application nos. 188/56, *Yearbook of the European Convention on Human Rights*, 1 (1956-7), p. 178; 232/56, *ibid.*, p. 144; and 222/56, *ibid.*, 2 (1958-9), p. 351.

¹³² Cançado Trindade, *op. cit.* above (n. 130), pp. 145-53.

¹³³ See, e.g., the second *Cyprus* case, application no. 299/57, *Yearbook of the European Convention on Human Rights*, 2 (1958-9), p. 186.

to prove either that local remedies have been exhausted, or that they are not adequate and effective for redress, or else that there are special circumstances relieving him from the duty to exhaust local remedies.¹³⁴

Later, he describes the position reached by the jurisprudence of the Commission as follows:

Thus, the individual applicant has the duty to prove that he has exhausted local remedies, or else that he has not exhausted them because he was relieved by special circumstances from doing so, or because remedies did not exist, or were ineffective, as much as the respondent government is bound to prove that local remedies existed and had not been exhausted, and that they were adequate and effective.¹³⁵

Accordingly, the position reached by the European Commission is virtually similar to that reached by the Human Rights Committee in the matter of burden of proof. However, the European institutions at Strasbourg have gone further in one respect. In the case of *Fifty-seven Inhabitants of Louvain and Environs v. Belgium*,¹³⁶ the Commission expressly declared that the burden of proof did *not* fall on the individual applicant if the respondent Government had manifestly failed to plead non-exhaustion of domestic remedies when invited to express its opinion on the admissibility of an application.

(h) *Other Grounds of Inadmissibility*

Other grounds of inadmissibility are stated in Article 3 of the Protocol which reads: 'The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.' Furthermore, the Committee can only consider communications from individuals who claim that 'any of their rights enumerated in the Covenant have been violated . . .' (Article 2 of the Protocol). Accordingly, communications which relate to violations of rights not included in the Protocol must be declared inadmissible *ratione materiae*. For example, the Committee declared communication no. 53/1979 inadmissible because 'the right to dispose of property, as such, is not protected by any provision of the

¹³⁴ Op. cit. above (p. 236 n. 130), pp. 145-6.

¹³⁵ Ibid., pp. 149-50. Compare also the position under the Inter-American Commission on Human Rights, for which see Cançado Trindade, 'Exhaustion of Local Remedies in the Inter-American System', *Indian Journal of International Law*, 18 (1978), p. 345. See further, for the position under the International Convention on the Elimination of All Forms of Racial Discrimination, 1965, id., 'Exhaustion of Local Remedies under the United Nations International Convention on the Elimination of All Forms of Racial Discrimination', *German Yearbook of International Law*, 22 (1979), p. 374. On burden of proof under the ECOSOC Resolution 1503 (XLVIII) procedure, see id., op. cit. above (p. 236 n. 130), at pp. 163-8.

¹³⁶ Application no. 1994/63. See *Yearbook of the European Convention on Human Rights*, 3 (1960), p. 252.

International Covenant on Civil and Political Rights'.¹³⁷ Similarly, one of the reasons why *I.M. v. Norway*¹³⁸ was declared inadmissible was because 'the assessment of taxable income and allocation of houses are not in themselves matters to which the Covenant applies'.¹³⁹

An interesting question involving Article 2 of the Protocol arose for consideration in *J.K. v. Canada*.¹⁴⁰ The author of the communication alleged that he had been unjustly convicted of a criminal offence and sentenced to a term of imprisonment. An appeal before the Court of Appeals of Vancouver was rejected and a petition to the Supreme Court of Canada for leave to appeal was denied. The author alleged that he was innocent of the charge and, *inter alia*, that the Court of Appeal erred in not considering, or not properly evaluating, the new evidence submitted on appeal. Although all the events took place *prior* to the entry into force of the International Covenant on Civil and Political Rights and the Optional Protocol for Canada, the author pleaded that the stigma of the allegedly unjust conviction and the social and legal consequences thereof, including the general prejudice in society against convicted persons, made him a victim today of a number of articles of the Covenant. The author requested the Committee to invite the State party to ensure an annulment of the conviction and pay him an equitable indemnity for the injuries suffered as a consequence of his conviction.

The Committee noted that in so far as the communication related to events that occurred prior to 19 August 1976 (the date when the Covenant and the Optional Protocol entered into force for Canada) the communication was inadmissible *ratione temporis*. Furthermore, it was beyond the competence of the Committee to review findings of fact made by national tribunals or to determine whether national tribunals had properly evaluated new evidence submitted on appeal. Accordingly, in *these* circumstances, the Committee held that the author's contention that the continuing consequences of his conviction made him a victim today of violations of the Covenant 'do not themselves raise issues under the International Covenant on Civil and Political Rights in his case'.¹⁴¹ The Committee thus concluded that 'the author has no claim under Article 2 of the Optional Protocol'.¹⁴²

In effect, what the Committee was arguing here was that where the allegedly unjust conviction was unchallengeable *in itself*, both because it was delivered prior to entry into force of the relevant instruments for Canada and because, in any event, the finding of fact that the author had committed the crime was unreviewable by the Committee, then the effects

¹³⁷ GAOR, 39th Session, Supplement 40, Report of the Human Rights Committee, p. 118.

¹³⁸ Comm. no. 129/1982.

¹³⁹ GAOR, 38th Session, Supplement 40, Report of the Human Rights Committee, p. 242. See also *M.A. v. Italy* (Comm. no. 117/1981) and *L.T.K. v. Finland* (Comm. no. 185/1984). See further *J.B. et al. v. Canada* (Comm. no. 118/1982).

¹⁴⁰ GAOR, 40th Session, Supplement 40, Report of the Human Rights Committee, p. 215.

¹⁴¹ Ibid. at p. 216.

¹⁴² Ibid. at p. 216. See also *M.F. v. Netherlands* (Comm. no. 173/1984).

of the conviction (which itself was not a violation of the Covenant) could not of themselves amount to a violation. The Committee had no alternative but to declare the communication inadmissible because, as it pointed out, it had no authority to investigate findings of fact made by domestic tribunals. Any such investigation would be an unwarrantable extension of the terms of the Covenant and unacceptable to States parties. As such, any such intrusion into a matter beyond doubt within the domestic jurisdiction would be bound to attract severe criticism and seriously weaken the growing prestige and authority of the Committee.

Although an author need not prove his case at the admissibility stage, he must produce sufficient evidence to substantiate a *prima-facie* case. This approximates somewhat to the 'manifestly ill-founded' ground of inadmissibility under the European Convention. Accordingly, the Committee has declared a number of communications inadmissible on the grounds of non-substantiation. For example, in *I.M. v. Norway*,¹⁴³ the Committee rejected the author's claim that he was a victim of racial discrimination for lack of evidence in substantiation. In *J.S. v. Canada*,¹⁴⁴ the Committee rejected the applicant's claim, *inter alia*, on the ground of non-substantiation of allegations. Similarly, in *J.D.B. v. Netherlands*,¹⁴⁵ the Committee reached a similar conclusion because no facts had been submitted in substantiation of the author's claim that he was a victim of a violation of any of the rights guaranteed by the Covenant.¹⁴⁶

When is a communication 'incompatible' with the provisions of the Covenant in accordance with the terms of Article 3 of the Protocol? Generally it seems that communications are inadmissible if their authors complain of restrictions or limitations on particular substantive rights, which are actually justified by the need to ensure that those rights are not abused. Accordingly, in *M.A. v. Italy*,¹⁴⁷ where the author had been convicted of reorganizing the dissolved Fascist party, the Committee declared that these acts

were of a kind which are removed from the protection of the Covenant by Article 5¹⁴⁸ thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of Articles 18 (3), 22 (2) and 25 of the Covenant . . . [T]herefore, the communication is inadmissible under Article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant, *ratione materiae*.¹⁴⁹

The limitations invoked by the Committee in this case were those on freedom to manifest one's religion or beliefs (Article 18 (3)), freedom of expression (Article 19 (3)), freedom of association (Article 22 (2)) and freedom to take part in the conduct of public affairs, etc. (Article 25).

¹⁴³ Comm. no. 129/1982.

¹⁴⁴ Comm. no. 130/1982.

¹⁴⁵ Comm. no. 178/1984.

¹⁴⁶ See also *O.F. v. Norway* (Comm. no. 158/1983) and *E.H. v. Finland* (Comm. no. 170/1984).

¹⁴⁷ Comm. no. 117/1981.

¹⁴⁸ See p. 224 n. 77 above.

¹⁴⁹ GAOR, 39th Session, Supplement 40, Report of the Human Rights Committee, p. 196.

Similarly in *J.R.T. and the W.G. Party v. Canada*,¹⁵⁰ the applicants' contention that their right to freedom of expression under Article 19 (2) of the Covenant was being violated by Canada was rejected as being incompatible with the provisions of the Covenant in these terms:

... not only is the author's 'right' to communicate racist ideas not protected by the Covenant, it is in fact incompatible with its provisions . . . [T]he opinions which [the applicant] seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20 (2) of the Covenant to prohibit.¹⁵¹

These decisions on other grounds of inadmissibility by the Committee really go no further than the strict terms of the Protocol require. By comparison with the European Convention, there is no concept precisely similar to the 'manifestly ill-founded' ground of inadmissibility contained in Article 27 (2) of that Convention. However, the Committee does insist on some substantiation of a prima-facie case at the admissibility stage. By September 1986, 211 communications had been received for placement before the Committee. Out of these, one hundred and six had been discontinued, suspended, withdrawn, or been declared inadmissible. Since the Committee has only published forty-six of these decisions, it is only possible to say that much less than 50 per cent of communications received have been declared inadmissible. By contrast, under the procedure established by the Strasbourg institutions, by 1 January 1987, out of a total of 11,659 decisions on admissibility taken by the European Commission, only 492 had been declared admissible. Accordingly, almost 96 per cent of applications to Strasbourg have been declared inadmissible!

IV. SOME PROBLEMS OF PROCEDURAL METHOD

The Human Rights Committee has unequivocally held that the right of an individual under the Protocol to communicate with it regarding violations of rights contained in the Covenant must be effective and not rendered illusory by the State party. Nowhere is this more forcefully stated than in the case of *Sendic v. Uruguay*.¹⁵² In an interim decision taken on 24 October 1980, the Committee decided (principally because of the failure of the State party concerned to respond to repeated requests to provide it with full details about Mr Sendic's medical condition) that Mr Sendic 'should be given the opportunity himself to communicate directly with the Committee'.¹⁵³

Uruguay alleged that this decision exceeded the authority of the

¹⁵⁰ Comm. no. 104/1981.

¹⁵¹ GAOR, 38th Session, Supplement 40, Report of the Human Rights Committee, pp. 234 and 236.

¹⁵² Comm. no. R.14/63 submitted by the alleged victim's wife claiming that he had been arbitrarily detained and subjected to torture.

¹⁵³ GAOR, 37th Session, Supplement 40, Report of the Human Rights Committee, p. 118. Such a request has been repeated in other cases such as *Larrosa Bequío v. Uruguay* (Comm. no. 88/1981).

Committee. The Committee categorically refuted such a suggestion in the following unequivocal terms:

The Human Rights Committee cannot accept the State party's contention that it exceeded its mandate when in its decision of 24 October 1980, it requested the State party to afford to [the alleged victim] the opportunity to communicate directly with the Committee. The Committee rejects the State party's argument that a victim's right to contact the Committee directly is invalid in the case of persons imprisoned in Uruguay. If governments had the right to erect obstacles to contacts between victims and the Committee, the procedure established by the Optional Protocol would, in many instances, be rendered meaningless. It is a prerequisite for the effective application of the Optional Protocol that detainees should be able to communicate directly with the Committee. The contention that the International Covenant and the Protocol apply only to states, as subjects of international law, and that, in consequence, these instruments are not directly applicable to individuals is devoid of legal foundation in cases where a state has recognized the competence of the Committee to receive and consider communications from individuals under the Optional Protocol. That being so, denying individuals who are victims of an alleged violation their rights to bring the matter before the Committee is tantamount to denying the mandatory nature of the Optional Protocol.¹⁵⁴

The Committee was obviously right to conduct such a bold defence of the victim's right to uninterrupted access to, and communication with, the Committee, otherwise the right of individual petition is rendered nugatory. It is interesting to note by way of comparison that Article 25 of the European Convention on Human Rights, which enshrines the right of individual application to the Strasbourg institutions, also extracts from those High Contracting Parties who recognize the right an undertaking 'not to hinder in any way the effective exercise of this right'. This is buttressed by the European Agreement of 6 May 1969 relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights, especially Article 3. This article imposes on States a duty to respect the rights of persons who take part in proceedings before the Commission to correspond freely with the Commission. As far as persons under detention are concerned the exercise of the right implies that if their correspondence is examined by the competent authorities, its dispatch and delivery shall nevertheless take place without undue delay and without alterations. Thus *at most* passive censorship is lawful. The European Commission has developed an impressive jurisprudence on the *effective exercise* of the individual right of petition. Problems have arisen especially in relation to prisoners' access in the European experience. There seems little doubt, therefore, that by analogy, the Committee should also ensure the effective exercise of the right of individual communication by the insertion of a suitable further rule in the provisional rules of procedure.¹⁵⁵

¹⁵⁴ Ibid. at p. 120.

¹⁵⁵ See Mikaelson, *European Protection of Human Rights* (Sijthoff & Noordhoff, 1980) for a full discussion of the European case law.

Equally, the Committee has gone out of its way to afford to a State party the opportunity to deliver a full refutation of allegations. In the case of *Bleier v. Uruguay*,¹⁵⁶ one of the principal issues was what had happened to Eduardo Bleier. The authors (the victim's wife and daughter) alleged and produced information that he had been arrested, detained and tortured by the governmental authorities. The Government had only responded by stating that a warrant had been issued for his arrest but that his whereabouts was unknown. In its interim decision, the Committee decided:

... the failure of the State party to address in substance the serious allegations brought against it and corroborated by unrefuted information, cannot but lead to the conclusion that Eduardo Bleier is either still detained, incommunicado, by the Uruguayan authorities or has died while in custody at the hands of the Uruguayan authorities.¹⁵⁷

The Government replied alleging that the Committee had displayed not only an ignorance of legal rules relating to presumption of guilt, but a lack of ethics in carrying out its tasks. Again, the Committee categorically rejected such a criticism. It stated:

The Human Rights Committee cannot accept the State party's criticism that it has displayed an ignorance of legal rules and a lack of ethics in carrying out the tasks entrusted to it or the insinuation that it has failed to carry out its task under the rule of law. On the contrary, in accordance with its mandate under Article 5 (1) of the Optional Protocol, the Committee has considered the communication in the light of the information made available to it by the authors of the communication and by the State party concerned. In this connexion the Committee has adhered strictly to the principle *audiatur et altera pars* and has given the State party every opportunity to furnish information to refute the evidence presented by the authors.¹⁵⁸

It is perfectly clear from the case law that the Committee has gone out of its way to afford to a State party every chance to furnish evidence in defence of the allegations. Indeed, the cases are replete with examples of the Committee allowing Uruguay (in particular) repeated extensions of the time-limits for submissions, in an effort to afford *every* opportunity to refute allegations. The concessions on the time-limits, stipulated in Article 4 (2) of the Protocol, afforded to State parties are probably justified on the grounds of flexibility, despite the fact that they may result in an undue and sometimes intolerable delay for the author, since in principle decisions will be better informed and the views of the Committee will carry greater weight if seen to be balanced with appropriate submissions in defence. Thus it seems that late submissions should be and are taken into account by the Committee. Furthermore, being as generous as is possible

¹⁵⁶ Comm. no. R.7/30.

¹⁵⁷ GAOR, 37th Session, Supplement 40, Report of the Human Rights Committee, pp. 134-5.

¹⁵⁸ Ibid., p. 135.

to States, commensurate with the rights of a petitioner, can only encourage States to believe that they will get an impartial hearing from the Committee. This will encourage confidence in the system.

Nevertheless, there comes a point beyond which the Committee is not prepared to wait in the interests of justice to the author. In its very first final decision in *Massera v. Uruguay*,¹⁵⁹ where no detailed reply to the substance of the allegations was received by July 1979, when the formal time-limit had expired in August 1978, the Committee decided to proceed to deliver its final views in August 1979. The Committee made what was in effect a default judgment. It accepted the facts alleged by the author as proved in the absence of any controverting evidence. This decision was necessary because otherwise the whole optional procedure could be brought to a halt by the recalcitrance of States.¹⁶⁰ Such an approach would seem to place due weight on the Committee's responsibility to petitioners and, therefore, ultimately on the success of the whole procedure. As such, its justification is secure.

However, the overall principle guiding the Committee when considering communications under Article 5 (1) of the Protocol remains one of offering the maximum possible opportunity to the State to furnish evidence. It was summarized by the Committee in the following way in *Quinteros v. Uruguay*:¹⁶¹

In accordance with its mandate under Article 5 (1) of the Optional Protocol, the Committee has considered the communication in the light of the information made available to it by the author of the communication and by the State party concerned. In this connection, the Committee has adhered strictly to the principle *audiatur et altera pars* and has given the State party every opportunity to furnish information to refute the evidence presented by the author.¹⁶²

The Committee's response to the many occasions when it has been faced with an outright refusal or an inadequate attempt by a State party to provide it with the written information required by Article 4 (2) of the Protocol once again shows up the strength of the Committee's commitment to the protection of human rights. The general principles underlying the Committee's approach were clearly stated in the *Quinteros* case.¹⁶³ It said:

The State party appears to have ignored the Committee's request for a thorough inquiry into the author's allegations. The Committee reiterates that it is implicit in Article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence

¹⁵⁹ Comm. no. R.1/5.

¹⁶⁰ Similar problems have arisen in other cases and have been dealt with similarly by the Committee. See, e.g., *Millan Sequeira v. Uruguay* (Comm. no. R.1/6).

¹⁶¹ Comm. no. 107/1981.

¹⁶² GAOR, 38th Session, Supplement 40, Report of the Human Rights Committee, p. 223.

¹⁶³ Loc. cit. above (n. 161).

submitted by the author of the communication, and to furnish to the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by substantial witness testimony . . . and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.¹⁶⁴

This approach was emphatically endorsed and carried one stage further in *Bleier v. Uruguay*.¹⁶⁵ Here, the Committee declared: 'With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information.'¹⁶⁶ This view represents the constant jurisprudence of the Committee and was, for example, fully endorsed in *Larrosa Bequio v. Uruguay*,¹⁶⁷ *Marais v. Madagascar*¹⁶⁸ and *Conteris v. Uruguay*.¹⁶⁹

There can be little doubt that such a courageous approach, while not reversing the normal burden of proof completely, goes some considerable distance in outflanking deliberately obstructive tactics by a State party, the sole objective of which is simply to deny the petitioner access to information by which he may establish a prima-facie case. By stipulating an equivalent burden of proof on the State concerned, it is hoped that the Committee may prevent a State from shielding its violations behind a veil of impenetrability. Such a positive stance from the Committee can only be welcomed, especially in the experience of the recalcitrance of some States, notably Uruguay.

As well as dealing with this issue on the general level, the Committee laid down concrete guide-lines in some of the early cases in which it delivered final views. These definite indications of what is required from a State party under Article 4 (2) of the Protocol represent its established jurisprudence. As mentioned above, in the *Massera* case,¹⁷⁰ where no information had been provided, the Committee did not find any difficulty in proceeding to formulate its final views. In *Santullo v. Uruguay*,¹⁷¹ the Committee found Uruguay's response under Article 4 (2) of the Protocol to be totally inadequate. It contained no explanations concerning the merits of the *specific* case. The Committee declared that a refutation of the allegations raised in general terms was totally insufficient. The allegations themselves should have been investigated.

¹⁶⁴ GAOR, 38th Session, Supplement 40, Report of the Human Rights Committee, p. 223. See also *Jaona v. Madagascar* (Comm. no. 132/1982) for a briefer endorsement of this principle, and *Baboeram et al. v. Suriname* (Comm. nos. 146/1983 and 148 to 154/1983) for an almost identical enunciation.

¹⁶⁵ Loc. cit. above (p. 242 n. 156). See also *Romero v. Uruguay* (Comm. no. 85/1981).

¹⁶⁶ GAOR, 37th Session, Supplement 40, Report of the Human Rights Committee, p. 135.

¹⁶⁷ Comm. no. 88/1981.

¹⁶⁸ Comm. no. 49/1979. The facts of this case were very similar to those in the case of *Wight v. Madagascar* (Comm. no. 115/1982).

¹⁶⁹ Comm. no. 139/1983.

¹⁷⁰ Loc. cit. above (p. 243 n. 159).

¹⁷¹ Comm. no. R.2/9.

In *Lanza v. Uruguay*,¹⁷² the Committee confirmed its jurisprudence in *Santullo* that denials of a general character are totally insufficient to rebut specific allegations of violations. What were required were *specific* responses and *pertinent* evidence. A similar view was taken by the Committee in *Torres Ramirez v. Uruguay*.¹⁷³ In *Millan Sequeira v. Uruguay*,¹⁷⁴ the Committee informed Uruguay that when it made its submissions under Article 4 (2) of the Protocol, they must relate to the substance of the matter under consideration, and in particular the *specific* violations alleged to have occurred. It also requested copies of any court orders or decisions of any relevance. In *Grille Motta v. Uruguay*,¹⁷⁵ the Committee declared:

A refutation of [the] allegations in general terms is not sufficient. The State party should have investigated the allegations in accordance with its laws and its obligations under the Covenant and the Optional Protocol and brought to justice those found to be responsible.¹⁷⁶

This case law has been constantly reaffirmed by the Committee. The cases display a systematic and coherent approach to building up a logical and complete case law on particular issues. However, the Committee has on occasion been driven to launch an unveiled attack on a State party's failure to co-operate. Whether or not such an aggressive step is desirable, it occurred in the case of *Oxandabarat Scarrone v. Uruguay*.¹⁷⁷ In this case (as in many others) the Committee had repeatedly asked Uruguay to enclose copies of any relevant court decisions taken in respect of Mr Oxandabarat Scarrone. No documents were disclosed in spite of these requests. The Committee protested:

In these circumstances and considering that the State party has never offered any explanation as to why the documents in question have not been made available to [the Committee], the failure to produce these documents inevitably raises serious doubts concerning them. If reasoned decisions exist, it is not understandable why such pertinent information is withheld. The lack of precise information seriously hampers the discharge of the functions of the Committee under the Optional Protocol.¹⁷⁸

The achievements of the Committee may also be gauged against the effect of its final views under Article 5 (4) of the Optional Protocol. The first success achieved by the Committee was in *Waksman v. Uruguay*,¹⁷⁹ in which after its decision on admissibility the Committee was informed by Uruguay that it had instructed its appropriate consulate abroad to issue the author with a new Uruguayan passport. The Committee was thus able

¹⁷² Comm. no. R.2/8.

¹⁷³ Comm. no. R.1/4.

¹⁷⁴ Comm. no. R.1/6.

¹⁷⁵ Comm. no. R.2/11.

¹⁷⁶ GAOR, 35th Session, Supplement 40, Report of the Human Rights Committee, p. 136.

¹⁷⁷ Comm. no. 103/1981.

¹⁷⁸ GAOR, 39th Session, Supplement 40, Report of the Human Rights Committee, p. 157.

¹⁷⁹ Comm. no. R.7/31.

to discontinue consideration of the communication. By notes dated 31 May and 10 July 1984 the Government of Uruguay furnished the Secretary-General of the UN with lists of persons released from imprisonment with the request that these lists be brought to the attention of the Committee. The lists included the names of two persons whose cases had been considered and concluded by final views of the Committee—Alberto Altesor and Ismael Weinberger Weisz. From other sources, the Committee heard of the release of José Luis Massera, Lillian Celiberti, Rosario Pietraroia and Rita Ibarburu by Uruguay, all of whose cases had been considered by the Committee. The Committee was also informed in 1984 of the release of Dave Marais by the Malagasy authorities and his subsequent departure from Madagascar following the completion of his sentence.

Furthermore, when forwarding its views to a State party, the Committee invites the State party to inform it of any action taken pursuant to its views. Canada informed the Committee on 6 June 1983,¹⁸⁰ with regard to the *Lovelace* case, of its commitment to remove from its Indian Act any provisions which discriminate on the basis of sex. Mauritius informed the Committee on 15 June 1983¹⁸¹ with regard to the *Mauritian Women* case, that the allegedly discriminatory legislation on grounds of sex had been amended by the Immigration and Deportation Amendment Acts of 1983. Finland informed the Committee on 20 June 1983¹⁸² of special measures it had taken in response to the Committee's views in the *Hartikainen* case. It is also interesting to observe that, by a note delivered to the Committee by a representative of the Malagasy Government on 19 July 1985, the Government apologized for being unco-operative in the case of *Jaona v. Madagascar*,¹⁸³ and promised to co-operate more fully with the Committee in the future. Thus, although the Committee has no executive powers to enable it to enforce its views, in this way the Committee is able to monitor the implementation of its decisions.

It is also interesting to note that at the twenty-fourth session of the Committee held in New York from 25 March to 12 April 1985, a representative of the Government of Uruguay conveyed a message to the Committee from the Minister for Foreign Affairs of that country. Referring to the solemn announcement of the Government of Uruguay regarding its intention to observe faithfully the provisions of the Universal Declaration of Human Rights, 1948, and of *all* international human rights instruments, the message listed a variety of measures that had already been taken to that end. The message also stressed the appreciation of the people of Uruguay for the close attention the Committee had given to communications from Uruguay. In reply the Committee indicated that it

¹⁸⁰ GAOR, 38th Session, Supplement 40, Report of the Human Rights Committee, pp. 249–53.

¹⁸¹ Ibid., p. 254.

¹⁸² Ibid., pp. 255–6.

¹⁸³ Comm. no. 132/1982.

hoped this message showed that Uruguay had embarked on a new path towards full compliance with the Covenant.¹⁸⁴

Has the Committee any power under the Optional Protocol to take any further action in cases which have already been concluded by the adoption of *final* views or declared inadmissible? The problem has arisen because, in a number of cases, authors have requested the Committee to take additional steps to persuade the allegedly delinquent State to act in conformity with the views expressed by the Committee. In other cases which have been concluded by a declaration of inadmissibility, authors have asked for a review. This question was discussed by the Committee at its seventeenth session. After much discussion, the view of the Committee was that, in general, its role in the examination of a case comes to an end either when final views are adopted or when a final declaration of inadmissibility is made. In wholly exceptional cases the Committee may agree to reconsider its final decision. It was agreed that this could only occur when the Committee is satisfied that new facts have been put before it by a party claiming that these facts were not available to it at the time of the consideration of the case and that these facts would have materially altered the final decision of the Committee.¹⁸⁵

It is suggested that this conclusion represents a fair balance between the need to prevent the Optional Protocol machinery from degenerating into an 'exercise of futility'¹⁸⁶ and, on the other hand, the need to reassure States that there is no danger that the Committee will add additional obligations and procedures to the Optional Protocol, beyond that formally contained therein, which would make States 'think twice before ratifying the Optional Protocol'.¹⁸⁶ Furthermore, it reinforces the conclusion that the Committee is anxious to be seen to be confirming its judicial character, since most tribunals limit revision in a similar way to situations where material new facts have emerged.

One of the most disturbing difficulties faced by the Committee is the problem of delay. Since the Committee, which meets three times a year, must allow both the author and the State party enough time to prepare their submissions, a decision on admissibility can only be taken between six months and one year after the initial submission. Views under Article 5 (4) of the Protocol may follow one year later. The Committee, keen to act as expeditiously as possible, aims to complete the procedure within two or three years. The Committee is helped in its task by Working Groups on Communications (consisting of not more than five of its members) which submit recommendations to the Committee on the action to be taken at various stages in the consideration of each case. In a number of cases, the Committee has also designated individual members to act as Special

¹⁸⁴ See also the plaudits awarded to the new Government of Uruguay in *Conteris v. Uruguay* (Comm. no. 139/1983).

¹⁸⁵ GAOR, 38th Session, Supplement 40, Report of the Human Rights Committee, pp. 93-4.

¹⁸⁶ Ibid. at p. 93.

Rapporteurs, who place their recommendations before the Committee for consideration. Nevertheless, unconscionable delays may occur. In the case of *Drescher Caldas v. Uruguay*,¹⁸⁷ the final views of the Committee were expressed some four years after its decision on admissibility. A delay of three and a half years before a decision on the merits is not uncommon. Such delays cannot but damage the prestige of the Committee in the eyes of the petitioner. However, the appropriate solution to this difficulty is far from clear.

The problem of delay is inextricably bound up with a very heavy and rapidly increasing workload that is being thrust upon the Committee. The Committee is certainly aware of these difficulties. Some members believe that the present workload has reached saturation point. How the Committee (and the Secretariat) will cope in future with the unremitting flow of cases to it will have to be seen. Of course, if the Committee were somehow to admit *oral* evidence, these problems would only become more acute. At present, under the terms of the Optional Protocol, the Committee is confined to an evaluation in the light of all written information. In 1979 the Committee discussed whether it would be possible to hear witnesses or to inspect any relevant object with the consent of the State party concerned.¹⁸⁸ Mr Tomuschat, commenting on this discussion, has observed:

To enlarge thus the circle of means of proof would entail a multitude of problems. Above all: can the stage of taking evidence take place differently according to the greater or lesser degree of preparedness of the State party concerned to allow for additional methods of proof? And how could the Human Rights Committee itself, being a body composed of experts in the service of the U.N. on a part-time basis only, cope with such a burden of work? In any event, these questions will become more urgent as proceedings progressively attain a higher degree of complexity.¹⁸⁹

V. EVALUATION

John P. Humphrey wrote in 1973 that 'the conclusion must be . . . that while a really independent, courageous and imaginative Human Rights Committee may be able to build on the highly circumscribed base provided by the Covenant and Protocol, the enforcement procedures which they contemplate are weak'.¹⁹⁰ The Human Rights Committee has been bold and imaginative. Generally, whenever the Protocol has been silent on a particular point, the Committee has sought to fill the legal vacuum. Whenever the terminology in the Protocol has been capable of

¹⁸⁷ Comm. no. 43/1979.

¹⁸⁸ UN Doc. CCPR/C/SR.138, paras. 105-21.

¹⁸⁹ 'Evolving Procedural Rules: The UN Human Rights Committee's First Two Years of Dealing with Individual Communications', *Human Rights Law Journal*, 1 (1980), p. 249 at pp. 254-5.

¹⁹⁰ 'The International Law of Human Rights in the Middle Twentieth Century', in Bos (ed.), *The Present State of International Law and Other Essays* (Deventer, 1973), p. 75 at p. 88.

differing interpretations, the Committee has invariably opted for that offering the greater measure of protection to the human rights of individuals in international law. The Committee has used the limited base of the Covenant and Protocol to etch for itself a significant place in the hierarchy of international organs active in the field of protection of human rights. Its prestige and authority are now very well established.

Some years ago Professor Humphrey declared: 'what is needed, and what does not yet exist, is some effective and orderly machinery whereby the actual victims whose rights have been violated can bring their complaints before some United Nations body on their own initiative for objective consideration in an atmosphere of judicial impartiality'.¹⁹¹ Although, of course, in no sense a court of law, the Committee has striven to be seen to be acting in a way as nearly as possible similar to that in which a court of law acts. As Christian Tomuschat has aptly remarked:

The Human Rights Committee has managed to make 'views' under Article 5 (4) of the Optional Protocol an efficient tool of its evaluation. None of the decisions hitherto handed down reads like a communiqué. Obviously, they have all been drafted on the pattern of a judicial decision. After an accurate description of the facts of the case and of the proceedings before the Human Rights Committee, legal reasons are set out. In a final operative part a precise enunciation of the violations having occurred is given, coupled with the invitation to the Government concerned to take immediate steps in favour of the victims.¹⁹²

He concludes:

Legally, the views formulated by the Human Rights Committee are not binding on the State party concerned which remains free to criticize them. Nonetheless, any State party will find it hard to reject such findings in so far as they are based on orderly proceedings during which the defendant party had ample opportunity to present its submissions. The views of the Human Rights Committee gain their authority from their inner qualities of impartiality, objectiveness and soberness. If such requirements are met, the view of the Human Rights Committee can have a far-reaching impact, at least *vis-à-vis* such governments which have not outrightly broken with the international community and ceased to care any more for concern expressed by international bodies. If such a situation arose, however, even a legally binding decision would not be likely to be respected.¹⁹²

Sean McBride has made the criticism that UN Committees are not ideal bodies to be charged with implementation because they are subject to political and ideological idiosyncracies.¹⁹³ As far as the Human Rights Committee is concerned, such fears have in large measure proved

¹⁹¹ 'The Revolution in the International Law of Human Rights', *Human Rights*, 4 (1975), p. 205 at p. 213.

¹⁹² Loc. cit. above (p. 248 n. 190), at p. 255.

¹⁹³ 'The Strengthening of International Machinery for the Protection of Human Rights', in Eide and Schou (eds.), *Proceedings of the Nobel Symposium on the International Protection of Human Rights* (Stockholm, 1967).

groundless. Manfred Nowak has summarized the Human Rights Committee's experience in this regard thus:

In contrast to political U.N. bodies . . . and also to other committees of experts, the Human Rights Committee has succeeded surprisingly in avoiding political confrontations. It strives for *consensus* in all questions, and up to now no decision has been reached by a majority vote . . . The amicable, co-operative and restful atmosphere does not seem to be directed exclusively towards the outside . . . Despite the above mentioned tendency to avoid political confrontations, one can readily identify different theoretical and ideological approaches to the question of international measures of implementation. Those differences have almost exclusively emerged between East and West as concerns the issue of the Committee's power regarding the examination of state reports—and much less between North and South *or with respect to other functions such as the consideration of communications from individuals*.¹⁹⁴ The latter fact is a cause for particular surprise in view of the negative attitude of many states towards international procedures for dealing with individual complaints.¹⁹⁵

Many writers have called for the creation of an International or Universal Court of Human Rights. The origins of a *positive* suggestion in favour may perhaps be traced to a proposal first advanced by Australia at the Paris Peace Conference in 1946 and to the suggestion of the Australian representative, Colonel Hodgson, at the Human Rights Commission in 1947. It was never discussed in detail. In 1950 the Commission on Human Rights failed to refer a proposal regarding implementation by international jurisdiction to the International Law Commission. In 1961 the Colombian representative to the Sixth Committee of the General Assembly proposed that the question of the establishment of an International Tribunal for the protection of human rights be put on the agenda for the 1962 session of the General Assembly. In 1968 the issue of an International Court of Human Rights was discussed by Judge Elias of the International Court of Justice, in a paper delivered to the International Conference on Human Rights.¹⁹⁶ Furthermore, in October 1970 President Kaunda of Zambia, speaking to the General Assembly of the UN, said: 'the creation of an international tribunal to deal with complaints against violations of human rights must be given serious consideration'.¹⁹⁷ However, no one put the suggestion more eloquently than Sir Hersch Lauterpacht. Rejecting the conclusion he himself had reached earlier, that such a court would be unsound and impracticable, in 1950 he boldly declared:

In the matter of the fundamental rights of man the remedy is not complete—it is defective—unless in the last resort a judicial remedy is available . . . This means

¹⁹⁴ Emphasis added.

¹⁹⁵ 'The Effectiveness of the International Covenant on Civil and Political Rights—Stocktaking after the first eleven sessions of the UN Human Rights Committee', *Human Rights Law Journal*, 1 (1980), p. 136 at pp. 163–5.

¹⁹⁶ A/CONF.32/L.3.

¹⁹⁷ GAOR, 25th Session, Plenary Meetings, 1872nd meeting.

that in the long run an International Court of Human Rights must be regarded as an essential part of the Bill of Rights.¹⁹⁸

The creation of such a court would need to solve a host of intractable problems, beyond the scope of this paper. However, detailed suggestions have been made by some, such as MacBride¹⁹⁹ and Das.²⁰⁰ In essence, it has been suggested that the jurisdiction of such a court could be twofold. It could have ordinary or first instance jurisdiction and an appellate jurisdiction over regional courts of human rights, such as the Inter-American Court of Human Rights or the European Court of Human Rights. In essence, the claim for such a court is founded on the twin necessities of the independence and objectivity of any tribunal called upon to decide issues relating to the international protection of the rights of individuals.

Whatever the merits or demerits of the suggestion for the creation of such a court, it is tolerably clear that the UN is still not ready for it. Furthermore, it does not necessarily follow that the regional Court of Human Rights, which has been so successful in Europe, could be imitated at the international level. Equally, it is arguable that the experience of the Human Rights Committee shows that the creation of such a court is not necessarily the *sine qua non* of the effective protection of human rights at the international level. The Committee has shown itself more than capable of defending the rights of the individual in the international forum. Its success may raise issues about the necessity to establish such a court. Even if, in the last resort, such an institution is both a desirable and an achievable objective, the Human Rights Committee can 'hold the fort' in the meantime. To date, it has emerged with flying colours. It is hoped that these colours will never be lowered.

¹⁹⁸ *International Law and Human Rights* (F. A. Praeger, New York, 1950), pp. 194 and 382.

¹⁹⁹ *Loc. cit.* above, p. 249 n. 194.

²⁰⁰ 'Some Reflections on Implementing Human Rights', in Ramcharan (ed.), *Human Rights Thirty Years after the Universal Declaration* (Martinus Nijhoff, 1979).

THE INFLUENCE OF ANDRES BELLO ON LATIN-AMERICAN PERCEPTIONS OF NON-INTERVENTION AND STATE RESPONSIBILITY*

By FRANK GRIFFITH DAWSON¹

I. INTRODUCTION

IN 1832 a manuscript entitled *Principios de Derecho de Gentes* was delivered to a printing firm in Santiago, Chile. The author, who was identified on the title page simply as 'A.B.', was Andrés Bello, an exiled Venezuelan scholar employed by the Chilean Foreign Ministry. According to the better-known Argentine publicist Carlos Calvo, he was 'one of the most remarkable men Latin America has ever produced'.²

Bello's writings on international law today are largely unknown outside Latin America. This neglect is unwarranted because Bello was the first Latin-American legal commentator of the post-independence era to publish a systematic treatise on international law in Spanish for a western hemisphere audience. Enlarged and reissued in 1844 and 1864, his *Principios* moulded and guided the legal perceptions of practitioners, jurists and statesmen during the formative period of Latin-American national development.

Yet the *Principios* is of more than historical interest. Drawing upon the experience of nineteen years of exile in England, combined with extensive research at the British Museum and his duties as Secretary to the Chilean and Colombian legations in London, Bello distilled from the works of Vattel, Martens, Kent, Chitty and Wheaton an interpretation of international law which focused upon major nineteenth-century Latin-American political and legal preoccupations, including sovereignty, recognition, nationality, non-intervention, the peaceful settlement of disputes, diplomatic protection, the rights of neutrals, blockades, prize law, freedom of the seas and equal treatment of aliens and nationals. Some of these themes are today of minor interest. Others, such as non-intervention and State responsibility, still excite as much passion and controversy as when Bello first discussed them.

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¹ BA (Princeton), MA (Harvard), LL B (Yale); Fellow of Hughes Hall, Cambridge; Research Assistant in the Research Centre for International Law of the University of Cambridge; Member of the Bar of the State of New York. This paper was prepared for the Procedural Aspects of International Law Institute Inc. as part of a study financed by the Dana Fund for International and Comparative Legal Studies on the impact of Latin America upon international law while the author was a Visiting Fellow at the Research Centre for International Law of the University of Cambridge, 1984-5.

² C. Calvo, *Le Droit international théorique et pratique* (5th edn., 1896), vol. 1, p. 109.

II. THE EARLY YEARS: CARACAS, 1781-1810

On 29 November 1781, when Andrés Bello was born, Caracas was still the capital of the Spanish colonial administrative unit known as the Captaincy General of Venezuela. It was a small city, about 2 miles square, with the streets arranged in the traditional gridiron fashion so favoured by colonial city planners, and interspersed with three main plazas. Although it lacked the splendid religious and civil architecture and culture which characterized the viceregal capitals of Mexico, Bogotá and Lima, even at that early date Caracas could boast a university staffed by religious orders who taught their less than 500 pupils basic Latin, philosophy, grammar and theology. Foreign languages were not in the curriculum, however, and scant opportunities existed to learn mathematics and the sciences. It seems in retrospect an inappropriate birthplace for the outstanding Latin-American intellectual of the nineteenth century.³

Bello's father was a lawyer, as well as a distinguished musician, and had his son tutored so that he could enter the university in 1796. The boy studied law and medicine, taught himself French and English, and graduated in May 1800. He then became a civil servant in the Secretariat of the Captaincy General where he acquired a rudimentary knowledge of foreign affairs, principally through correspondence with the Governors of the French and English Antilles. He drafted documents, prepared translations, and read assiduously the English books and newspapers sent by his friend John Robertson, secretary to the Governor of Curaçao.⁴

Bello's tranquil bureaucratic life was interrupted forever when in May 1808 Napoleon forced the abdications of Spain's King Charles IV and of his son, the future Ferdinand VII. Within days French troops had crossed the Pyrenees to place Napoleon's brother Joseph on the Spanish throne, thereby unleashing a chain of political manœuvres and violence which would lead to the fragmentation of Spain's New World empire.⁵

When news of the French invasion reached remote Caracas in June 1808 the Captain General, under pressure from local patriots, issued a public proclamation acknowledging Ferdinand as the legitimate King and recognizing the authority of the Seville Central Junta which had

³ The earliest biography of Bello is M. Amunátegui, *Vida de Don Andrés Bello* (1882). See also E. Vicuña, *Don Andrés Bello* (1940); P. Urquieta, *Andrés Bello* (1948); and G. Aponte, *Andrés Bello* (1969). A more recent English biography is R. Caldera, *Andrés Bello* (1976).

⁴ Caldera, *op. cit.* (previous note), at pp. 21-4. When the naturalist Baron von Humboldt visited Caracas in 1800, young Bello was his guide to the surrounding countryside and undoubtedly practised his newly acquired French: T. Alcántara, *Historia de Caracas* (1983), p. 39. During this period Bello began his long association with the press when in 1808 he became editor of the semi-official *Gaceta de Caracas*: Caldera, *op. cit.* (previous note), at p. 22.

⁵ For the background and immediate effects of the French invasion, see J. Lynch, *The Spanish American Revolutions, 1808-1826* (1973), pp. 34-5; *id.*, 'Great Britain and Latin American Independence', in Fundación La Casa de Bello (ed.), *Bello y Londres* (1980) (hereinafter cited as *Bello y Londres*), vol. 1, p. 33.

been established to resist the French invasion.⁶ In February 1810 the Central Junta was dissolved and replaced by a more conservative five-man Regency. The Caracas activists reacted by deposing the Captain General and forming their own Junta, ostensibly to maintain and protect the rights of King Ferdinand.⁷

Although most of the Spanish colonial administration was deported, Bello was appointed First Officer in the Department of State, the highest position after the Secretary of State himself. But by affirming Ferdinand as the rightful ruler of Spain, the Caracas Junta had alienated France. Moreover, by rejecting the Regency the patriots risked being considered traitors by Spain. The young militia Lieutenant-Colonel Simon Bolivar, Bello and Luis López Méndez, another Venezuelan patriot, therefore were dispatched to London by the Junta to seek the protection of the British Government from this twin danger.⁸

III. THE MIDDLE YEARS: LONDON, 1810-1829

Prior to 1808 English policy-makers had been receptive to suggestions by exiled Latin-Americans such as Francisco de Miranda that metropolitan Spain could be weakened and extensive trading advantages obtained by military intervention in the Latin-American colonies. Indeed, an expedition commanded by Lord Wellington was preparing to sail from Ireland to invade Mexico when news arrived of the French invasion of the Peninsula. Castlereagh, the Secretary of State for War and the Colonies, now perceived that England's best interests would be served by preserving the Spanish overseas empire so that it could aid the mother country against France. The expeditionary force was diverted to Portugal, and in January 1809 England and the Spanish Central Junta signed a treaty converting England's traditional enemy into an ally in the common struggle against Napoleon. Plans to undermine Spanish control in the New World were postponed, so that when the Venezuelan delegation reached London in July 1810 it was received unofficially and with extreme reserve by the Marquis Richard Wellesley, the Foreign Secretary and brother of the future victor of Waterloo, at his London home at Apsley House.⁹

⁶ Officials in Caracas first learned of the invasion when copies of *The Times* were sent to the Captain General by the Governor of the coastal town of Cumaná, who in turn had received them from the British Governor of Curaçao. The Captain General asked Bello to translate the newspapers, and so received the disturbing news of the Napoleonic invasion: Urquieta, op. cit. above (p. 254 n. 3), at p. 48.

⁷ The Junta was called *La Junta Conservadora de los Derechos de Fernando VII*: Lynch, op. cit. above (p. 254 n. 5), at pp. 194-5.

⁸ The goals and achievements of the Venezuelan mission are discussed in C. Mendoza, *La Junta de Gobierno de Caracas y sus Misiones Diplomáticas en 1810* (1936); see also Lynch, op. cit. above (p. 254 n. 5), at p. 36. Bello acted as secretary to the mission and drafted most of its correspondence to the British Government.

⁹ C. Webster (ed.), *Britain and the Independence of Latin America, 1812-1830* (1938), vol. 1, pp. 9-10; Mendoza, 'La Misión de Bolívar y López Méndez a Londres', *Boletín Académica Nacional de*

Despite Wellesley's professed neutrality, the Venezuelans eventually managed to extract a pledge of British protection from a French invasion, and a promise to act as a mediator in their dispute with Spain. English authorities in the Antilles were instructed to allow Venezuelan merchant ships access to their ports, and an English naval vessel was placed at the delegates' disposal for the voyage home. Bolívar returned in September 1810, leaving behind Bello and Luis López Méndez, to continue representing the Venezuelan Junta. Once in Caracas, Bolívar and Miranda, who had been induced by Bolívar to leave his London exile, persuaded the leading patriots to declare complete independence on 5 July 1811. This so-called First Republic lasted barely a year before it was crushed by royalist troops and Bello suddenly found himself unemployed in a strange country.¹⁰

The young Venezuelan could not have found a better city or period in which to have been exiled. After Waterloo London had become the intellectual centre of Europe. Books from all over the world appeared in its shops soon after publication, and many were even translated into English. Lack of press censorship encouraged vigorous political debate among daily and weekly newspapers, while quarterly magazines carried in-depth reviews of domestic and foreign publications. If this was the era of the raffish Regency bucks, Beau Brummell, bare knuckle prize fights and extravagant gambling, it was also the age of Jeremy Bentham, Byron, Shelley, Keats, Jane Austen, Sir Walter Scott and John Nash. Private and public manuscript and book collections were accessible to the serious scholar, as at the British Museum where Bello was a frequent and familiar visitor. Consequently, the Venezuelan had immediately available an immense variety of intellectual stimuli far surpassing anything he could have found in the New World.¹¹ During the next ten years

Historia, 18 (1935), p. 643 at pp. 647-51; J. Mancini, *Bolívar* (1935), pp. 313-18; Bolívar and López Méndez to Secretario de Estado y Relaciones Exteriores del Gobierno Supremo de Venezuela, London, 21 August 1810, in *Boletín Académica Nacional de Historia*, 21 (1938), pp. 50-5.

¹⁰ Lynch, *op. cit.* above (p. 254 n. 5), at pp. 197-8.

¹¹ Bello was also the beneficiary of a widespread public curiosity about the geography, peoples and resources of Latin America, which undoubtedly helped him make friends and secure teaching and translating assignments: Reidy, 'El Museo Británico y el Ambiente Cultural Inglés en el Primer Tercio del Siglo XIX', in *Bello y Londres*, vol. 1, p. 399, and Alberich, 'Actitudes Ingleses ante el Mundo Hispanico en la Epoca de Bello', *ibid.*, p. 125. This curiosity intermingled with sympathy for the patriots' cause led over 4,000 English and Irish volunteers to sail to South America to fight alongside the patriot armies of Bolívar and other Latin-American leaders. See A. Hasbrouk, *Foreign Legionaries in the Liberation of Spanish South America* (1928); generally, E. Lambert, *Voluntarios Británicos e Irlandeses en la Gesta Bolivariana* (1981). Luis López Méndez was particularly active in recruiting troops for Bolívar in London. His purchases of munitions and supplies on credit resulted in his imprisonment for debt several times: S. F. Larrain, *Cartas a Bello en Londres 1810-1829* (1968), pp. 129-32. See also Lynch, in *Bello y Londres*, vol. 1, pp. 39-40. The Colombian historian José Manuel Restrepo wrote that he had overheard Bolívar once state that López Méndez was 'the true Liberator of Colombia' since 'he would have been able to do nothing in the celebrated campaign of 1819 without the opportune and effective assistance that López Méndez provided in London by pledging his own responsibility and that of the still insecure government of Venezuela': *Historia de la Revolución de Colombia* (1969 edn.), vol. 4, p. 428 n. 3. See also pp. 12-13.

Bello, who married an English girl in 1814, with great difficulty supported his growing family by giving lessons in Latin, French and Spanish. At one point his friend James Mill came to his rescue with a commission to decipher Jeremy Bentham's illegible manuscripts. Despite economic hardship, however, Bello's intellectual production was astounding. He learned Greek, prepared a translation of the Bible and composed poems which have become Latin-American classics.¹²

In 1822 Bello obtained more regular employment as Secretary of the Chilean Legation. Unfortunately in 1824 the Chilean Minister, José Antonio de Irisarri, was dismissed owing to alleged irregularities in the disposal of the proceeds of a government loan negotiated in London. His successor distrusted Bello because of his friendship with the former Minister, and eventually forced his resignation. Happily Bello soon found a new position at the more important Colombian Legation.¹³ As Secretary to the Legation Bello drafted correspondence and notes to the Foreign Office and the Colombian Government on a wide range of legal and financial topics, including recognition of Colombian independence, loan negotiations, Colombian diplomatic relations with other European countries, Bolívar's Panama Conference, disputes over prizes captured by Colombian privateers, diplomatic immunity and English mediation in the colonies' war with Spain.¹⁴

Bello also must have learned much about State practice by observing at first hand the consequences of Waterloo, the proceedings of the Congress of Vienna, the rise and fall of the Holy Alliance, the beginnings of the French Revolution of 1830, the struggle for Greek independence and

¹² Bello's early life in London is described in Hood, 'El Londres de Andrés Bello', in *Bello y Londres*, vol. 1, at p. 17. Caldera, op. cit. above (p. 254 n. 3), at pp. 25-6. Bello also helped found and edit two short-lived Spanish language periodicals, and produced a study of the *Poem of the Cid* which is even today considered a critical masterpiece: Becco, 'Bibliografía Analítica de las Publicaciones de Don Andrés Bello en Londres', in *Bello y Londres*, vol. 2, at pp. 283, 293. Bello 'created a new poetic genre in his *American Silvas* (1827), stanzas on the tropic regions, which carry the description of fruits, plants and trees, to the highest levels of artistry': Arturo Torres-Rioseco, *The Epic of Latin American Literature* (1942), p. 56.

¹³ Colombia, which after 1820 comprised Venezuela, New Granada and Ecuador, had long attracted the sympathetic interest of the British public, politicians and merchants. Admiration for Bolívar was widespread. London newspapers regularly reported the victories and defeats of the patriot army in which numerous English volunteers had enlisted, while editorial columns and books extolled the commercial and trading benefits which would flow from recognition of the former Spanish colony. See, e.g., the widely read A. Walker, *Colombia, being a Geographical, Statistical, Agricultural, Commercial and Political Account of that Country, Adapted for the General Reader, the Merchant and the Colonist* (2 vols., 1822). As early as 1810, *The Times* was telling its readers 'that the affairs of South America are now assuming an aspect which must gratify the expectations of every lover of the prosperity of this nation. The inhabitants of that part of the world now begin to cherish the feelings, and to view the obvious considerations which demonstrate their capability of becoming permanently and gloriously independent . . . It is impossible to calculate the wide range of advantage which Great Britain will derive from the consummation of this approximating event': *The Times*, 13 August 1810, at p. 3, col. e.

¹⁴ Alcántara, 'La Actividad Diplomática de Andrés Bello en Londres', in *Bello y Londres*, vol. 1, at p. 501; De Mier, 'Andrés Bello en la Legación de Colombia en Londres, 1825-1829', *ibid.* at p. 513. His work at the Chilean Legation is described in Cruz, 'Bello, Irisarri y Egaña en Londres', *Boletín de la Académica Nacional de Historia*, 10 (1927), p. 334.

the agonizing dissolution of the Ottoman Empire. He saw English policy on Latin America evolve from a hesitant double game in 1810 to Canning's recognition of independence in January 1825. Bello also surely read in the newspapers of the activities of Richard Rush, the new US Ambassador, whose conversations with Canning led eventually to President Monroe's famous message to Congress, which in turn was widely reported in the English press.

In particular Bello must soon have realized that the defeat of Napoleon and the emergence of the new States of the western hemisphere had combined to create an era of uncertainty and transition. International law in the early nineteenth century had been basically an outgrowth of European politics and interests as demonstrated by State practice and the writings of European publicists. The international community was essentially European, and non-European States such as Turkey were considered the subjects of a 'marginal' international law which had been developed through treaties to deal with barbarous and semi-civilized areas.¹⁵ The rebellion of the US in 1776, however, followed after 1810 by the Latin-American independence movements, broke the European monopoly on membership in the community of nations by increasing substantially the number of participating independent States. The new entrants were European and Christian in heritage, and therefore considered by themselves and other States to be subjects of the general or classical European international law, rather than of the marginal international law reserved for non-European States.¹⁶ Nevertheless, the impact of US and Latin-American independence on basic international law principles was considerable because the emergence of these new States affirmed the rights of revolution and self-determination, and undermined for ever the principles of monarchical legitimacy.

In London as required by his duties at the legation and from intellectual curiosity Bello had read the principal available works on international law, including Grotius, Wolff, Von Martens, Burlamaqui and particularly

¹⁵ Espiell, 'El Derecho Internacional en los Años Londinenses de Andrés Bello 1810-1824', in *Bello y Londres*, vol. 1, at pp. 309, 310-11; Bull, 'The Emergence of a Universal International Society', in H. Bull and A. Watson (eds.), *The Expansion of International Society* (1984), pp. 11, 120-3.

¹⁶ One North American legal commentator in 1826 could therefore write self-confidently: 'The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age, and upon all mankind. But the Christian nations of Europe, and their descendants on this side of the Atlantic, by the vast superiority of their attainments in arts, and science, and commerce, as well as in policy and government; and, above all, by the brighter light, the more certain truths, and the more definite sanction, which Christianity has communicated to the ethical jurisprudence of the ancients, have established a law of nations peculiar to themselves': J. Kent, *Commentaries on American Law* (1851 edn.), p. 3. A more recent observer has noted that 'The new nations of the New World wanted to opt out of the Old World's balance of power. They wanted to be politically and strategically non-aligned. But they did not at all want to opt out of European society. On the contrary, they wanted to maintain the closest ties with Europe . . . In matters like international law and diplomatic practice they accepted the European rules and patterns without question': Watson, 'New States in the Americas', in Bull and Watson, op. cit. (previous note), at pp. 127, 138.

Vattel.¹⁷ None of these, however, dealt with the new reality created by the Napoleonic era and the western hemisphere independence movements. Not even Vattel, whose work was an essential handbook for statesmen, was now above criticism. Post-Napoleonic events, treaties and decisions by Admiralty and prize courts meant that his treatise no longer reflected accurately State practice or offered meaningful guidelines to deal with problems arising from the recognition of new States, intervention, the rights of neutrals, the rules of maritime warfare, civil war, diplomatic representation and State succession.¹⁸

The inadequacy of traditional legal source material, combined with the often dismissive if not menacing attitudes assumed by continental European States towards the emergent Latin-American republics, inspired Bello to attempt to restate and reformulate international law, which he considered the most important defence of weaker nations against more powerful members of the world community. Accordingly, although *Principios* is constructed upon an intellectual framework derived from traditional authorities, it incorporates successfully the new nineteenth-century State practice, the writings of contemporary English and American publicists and the decisions of courts on both sides of the Atlantic. Bello was not destined, however, to write the *Principios* in London nor even in his native Venezuela, which after 1819 had become part of the Republic of Colombia.

IV. THE PRODUCTIVE YEARS: CHILE, 1829-1865

Throughout his London exile Bello had hoped eventually to obtain employment in Colombia. At first the Legation post seemed to offer the best chance to remind the Government of his abilities and talents. In January 1824 he wrote to Pedro Gual, the Secretary of State, that '[my] foremost object is to return to Colombia. I have a family, and I feel that it would be impossible for me to bring up my children in England, reduced as I am to my present means . . .'.¹⁹

Unfortunately by late 1824 Colombia was virtually bankrupt, largely owing to Bolívar's expensive Peruvian campaigns and to the misapplication of the proceeds of the £6,750,000 in bonds floated in London. Bello's requests for a salary increase therefore were consistently refused. In desperation he wrote to Bolívar, whom he had once tutored, explaining his precarious financial position and requesting a more remunerative posting. The Liberator did not answer.

¹⁷ In addition to the British Museum, Bello also had access to the well-stocked library of Francisco de Miranda's house in Grafton Street, where he stayed for two years after Miranda had sailed on his ill-fated voyage to Venezuela in 1810: Rubiera, 'El Tiempo de Londres y las Fuentes de la Obra Internacional de Andrés Bello', in *Bello y Londres*, vol. 2, at pp. 243, 254-61.

¹⁸ Calvo would later write: 'Bello is the first to have demonstrated the inadequacy of principles communicated by Vattel and who has sought to complete them': op. cit. above (p. 253 n. 2), vol. 1, at p. 110.

¹⁹ Quoted in Caldera, op. cit. above (p. 254 n. 3), at p. 28.

Meanwhile the Chileans, at the urging of their London Minister, Mariano Egaña, who by now realized his mistake in forcing Bello's departure from the Legation, offered Bello a position at the Ministry of Foreign Affairs in Santiago. Bello, who had abandoned hope of receiving a firm offer from Bolívar, accepted. The latter's favourable answer to his former colleague's request arrived three months after Bello, his family, extensive library and trunks of notes and memoranda had embarked for Chile. Bello was 48 years of age, and about to begin the most productive phase of his long life.²⁰

Within three years Bello had become the Chief Legal Adviser to the Chilean Ministry of Foreign Affairs and was entrusted with negotiating a Treaty of Peace, Friendship, Commerce and Navigation with the US. In 1831 he began drafting a new Civil Code on which he laboured twenty-four years until it became law in 1855.²¹ He was elected to the Senate in 1837 where for twenty-one years he participated actively on committees preparing new codes of civil and criminal procedure, and in rationalizing the contradictory and often inappropriate legislation inherited from Spain. His intellectual and moral authority were so great that he prepared both Presidential messages to Congress, as well as the Congressional replies, and became the Government's principal draftsman for all major international diplomatic notes and correspondence.²²

Despite his official commitments Bello considered himself first and foremost an educator. His primary goal was to train 'the scholarly jurists' who he hoped would administer their countries wisely and justly, thereby eliminating the disorder and revolutionary turmoil which had ravaged Latin America since independence. Soon after arrival in Chile he began teaching civil, penal and constitutional law at the Colegio de Santiago. Later he instructed private pupils in natural and international law, Latin, Roman law, grammar, literature and philosophy. In late 1832 he completed the first edition of the *Principios*, which he had begun as a basic text for his students and for which he relied heavily on his experiences in London.²³ Bello did not confine his opinions on legal matters to scholarly volumes and diplomatic correspondence, however. As editor of the semi-

²⁰ The Bellos sailed from London on 14 February 1829 and finally landed at Valparaíso on 25 June after what must have been an exhausting voyage: *ibid.*

²¹ The code is still in force, and was used as a model by Argentina, Nicaragua, Venezuela, Colombia, Ecuador, Panama and Uruguay: Caldera, *op. cit.* above (p. 254 n. 3), at pp. 121-4; Daza, 'Andrés Bello y la Unidad de los Países Latinoamericanos', in *Foro Internacional sobre la Obra Jurídica de Don Andrés Bello* (1982), pp. 35, 36.

²² Bello's impressive accomplishments in government service are described in Urquieta, *op. cit.* above (p. 254 n. 3), at pp. 126-85; R. Blanco Fombona, *Grandes Escritores de América* (1917), pp. 69-74. Documents prepared by Bello are summarized in G. Cruz, *Andrés Bello y la Redacción de los Documentos Oficiales Administrativos, Internacionales y Legislativos de Chile* (1957).

²³ It was published under the initials 'A.B.' in 1832 but was first offered for sale in 1833. The Chilean Government ordered 500 copies in December 1831: Plaza, 'Introducción al Derecho Internacional de Andrés Bello', in A. Bello, *Derecho Internacional*, vol. 1, *Obras Completas de Andrés Bello*, vol. 10 (1954), at p. lxxviii. This volume contains the prologues to Bello's three editions, as well as the text of the 1864 edition incorporating the two prior, shorter editions.

official *El Araucano* between 1834 and 1865, he produced a stream of editorials on natural law, State recognition, treaty law, intervention and other legal issues, usually in response to articles in other newspapers with which he disagreed.²⁴

By the time he died on 15 October 1865, Bello had become an international figure. His books had been published throughout Latin America and in Europe, and in the US William Lawrence Beach, in his 1863 edition of Henry Wheaton's *Elements of International Law*, wrote that Bello was one of the first publicists to utilize the expression 'international law' and thereby recognize that the European 'monopoly' on classical international law was no longer valid.²⁵ Bello's reputation for impartiality combined with his sound legal background led to his designation as arbitrator in 1864 for a dispute between the US and Ecuador, and to a similar invitation in 1865 from Colombia and Peru. When Bello died the Government declared a day of national mourning, and ordered a marble statue to be erected to his memory. Twenty-six years later, the Chilean Government commissioned the publication of a special edition of his collected works, which was surely the best memorial of all.²⁶

V. *PRINCIPIOS DE DERECHO DE GENTES*: OBJECTIVES, STRUCTURE AND SOURCES

Bello's principal motive for writing the *Principios* was, as stated in the 1832 Prologue, 'to facilitate the study of an important part of the law of nations to which the most highly esteemed works on that topic in our language have not paid sufficient attention . . .' either because the authors did not deal with the more recent developments in international law, or because their works were too theoretical and abstract. At the same time Bello hoped his text would help to encourage 'the youth of the new American States in the cultivation of a science which if it previously could have been ignored with impunity, is today of the highest importance for the defence and vindication of our national rights'.²⁷

Bello's exile in London during the years when the Latin-American republics first joined the international community as independent, albeit weak, nations had convinced him of the need for a new international order based upon law through which the new States might consolidate and

²⁴ Urquieta, op. cit. above (p. 254 n. 3), at p. 133. In addition to his legal writings, while in Chile Bello also published poetry, a highly admired study on Spanish grammar, a work on philosophy, and numerous articles on literary criticism and history. Despite the diversity of his interests, his contributions were all of a surprisingly high uniform standard: *ibid.* at pp. 159-71; Caldera, op. cit. above (p. 254 n. 3), at pp. 34-5.

²⁵ H. Wheaton, *Elements of International Law* (ed. Beach, 1863), p. 20 n. 5; Aponte, op. cit. above (p. 254 n. 3), at p. 157.

²⁶ Urquieta, op. cit. above (p. 254 n. 3), at p. 205; Blanco Fombona, op. cit. above (p. 260 n. 22), at p. 75.

²⁷ Bello, op. cit. above (p. 260 n. 23), at pp. 3, 6. The translations hereinafter from Bello's works are by the present writer.

thus preserve their independence. Future Latin-American lawyers and statesmen therefore urgently required a familiarity with the basic concepts of existing international law and State practice. At the same time, the emergent nations had to create their own institutions by sifting the heritage of the past, retaining what was useful and rejecting the inappropriate.

Bello began the *Principios* with an introduction in which he defines international law as a collection of general laws or rules of conduct which States should observe among themselves for their common security and well-being. Bello believed, as did Vattel, that the law of nations was basically the law of nature applied on a global scale to States, just as domestically it governed individual conduct. This law was supplemented by positive or consensual law derived from treaties or compacts, and from judicial decisions and custom.²⁸ On balance Bello believed rules or deductions derived through theoretical speculation were 'worth much less than the positive rules, sanctioned by the conduct of civilized nations and powerful governments, and above all by the decisions of tribunals which pass judgement under the law of nations'.²⁹ Domestic legislation could not, however, alter international law so as to bind other States 'and the rules established by reason or by mutual consent are the only ones by which to resolve differences between sovereigns'.³⁰

Customary international law, however, according to both Bello and Vattel was only binding on the States which had voluntarily adopted it, and Bello therefore reasoned that 'there is no reason to suppose that, having adopted a custom, we have intended to pledge ourselves irrevocably to observe it'. Instead, he argued, the obligations of voluntary customary international law could be likened 'to those which arise from those agreements where each party reserved the right to terminate whenever he wants, giving the other party sufficient advance notice so he will not be prejudiced'.³¹

Anticipating that his civil law-trained readers would expect him either to provide or to refer them to an international legal code, Bello warned

²⁸ Bello, *op. cit.* above (p. 260 n. 23), at pp. 13, 19-21.

²⁹ Prologue to the 1844 edition, *ibid.* at p. 7.

³⁰ *Ibid.* at p. 23.

³¹ *Ibid.* at pp. 19-20. This interpretation of customary international law is significant and may have influenced Mexican agrarian reformers and policymakers who, in the aftermath of the 1910 Revolution, believed that they could in good faith and without violating general international law reject customary norms in favour of an overriding obligation to improve the material welfare of their people. See Kunz, 'The Mexican Expropriations', *New York Law Quarterly Review*, 17 (1940), pp. 327, 342, 349-59; 'The aspirations of the collectivity must prevail over individual interests': *ibid.* at p. 358. More recently, but also in the context of a wealth deprivation affecting aliens, Mexican Judge Padilla Nervo of the International Court of Justice wrote in his concurring opinion in the *Case Concerning the Barcelona Traction, Light and Power Company Limited* that 'In considering the needs and the good of the international community in our changing world, one must realize that there are more important aspects than those concerned with economic interests and profit making; other legitimate interests of a political and moral nature are at stake and should be considered in judging the behaviour and operation of the complex international scope of modern commercial enterprises': *ICJ Reports*, 1970, pp. 244, 248.

that 'there does not exist, and it is even possible never will exist, a definitive code containing all the precepts and prohibitions of international law, be it natural or positive. For this reason there are the great numbers of doubts and uncertainties which endanger peace between sovereigns.' Instead, Bello wrote that in the absence of a code, the sources of international law must be sought in (a) treaties and conventions; (b) proclamations and diplomatic correspondence between States; (c) maritime ordinances and regulations; (d) the decisions of prize courts; and (e) in the writings of commentators from Roman times through Suarez, Grotius, Pufendorf, Wolff and Vattel, up to his own contemporaries such as Kent, Wheaton, Phillimore and Reddie.³²

Bello's comments on the weight to be given the writings of legal commentators are of particular interest considering his own conscious effort and determination to instruct the Latin Americans in international law as a means of defending their rights:

Although on many points the doctrines of the principal authors are not uniform, there is a very strong presumption of the soundness of their maxims when they are in agreement; and no civilised power will reject them, unless they have the arrogance to place themselves beyond the judgement of the human race; of which, in truth, there have been examples in the last centuries and even in our times and in the most civilised part of Europe.³³

After the introduction, Bello divides the *Principios* into three sections: 'The State of Peace', 'The State of War' and 'The Rights and Functions of Diplomatic Agents'. The first deals with the concepts of nationhood and sovereignty; the property and territory of a State; jurisdiction; citizens and aliens; commercial and maritime law in peacetime; treaties and their interpretation; and the means of avoiding war, including mediation and arbitration. The second section covers the definition and consequences of war; the immediate effect of war on belligerents and their property; prize law; the rights and duties of neutrals; restrictions on neutral commerce; treaties and conventions relating to the conduct and termination of war; and civil war, banditry and piracy. The third (and shortest) division on diplomatic practice derives largely from personal experience and research in London. The space allotted to the various subdivisions within each section demonstrates that in the first half of the nineteenth century some topics were of particular interest and concern. For example, of the 189 pages in the 1864 edition devoted to the State of War, forty discuss prize law and seventy-seven deal with the effects of war upon neutrals and neutral commerce.

The elegant yet readable style of the *Principios*, its organization and the highly relevant topics it discussed—particularly the nature of State sovereignty and the rights of neutrals—assured an immediate success

³² Bello, op. cit. above (p. 260 n. 23), at pp. 23–8.

³³ Ibid. at p. 27.

throughout the Hispanic world. The 1832 edition was reprinted in Caracas (1837), Bogotá (1839) and Madrid (1843).³⁴ In 1844 the acclaim with which the first edition had been received and 'the use which is made of it in various educational institutions in the Hispanic American republics, and the scarcity in Chile of examples of the first edition despite its repeated reprinting in America and Europe . . .'³⁵ encouraged Bello to publish a revised, enlarged version. This in turn was reprinted in Lima (1844) and Caracas (1847). It now bore a new title, *Principios de Derecho Internacional*, and was published under the author's full name, rather than the more modest 'A.B.' of the 1832 edition.³⁶

Since by 1864 the prior editions of the *Principios* were again unavailable, and because it was utilized as a basic text at the college and university level in Chile, the Dean of the University of Santiago's Faculty of Law and Political Science requested Bello to prepare yet another version which, the author stated in the Prologue, 'was made doubly necessary by the changes which have occurred in international law in recent years'.³⁷ As with the prior editions, the Chilean Government defrayed the printing costs, and by 1883 Bello's last version of the *Principios* had been reprinted in Paris and Madrid.³⁸ As Héctor Gros Espiell, former Foreign Minister of Uruguay and a leading Bello scholar, remarked,

The *Principios* had an immediate influence . . . throughout the continent . . . between 1832 and 1865 it became known in all our countries, it was a university textbook, a reference manual for the Chanceries and was the model and inspiration for the incipient doctrine of international law which began to develop among us.³⁹

Not only did Bello write clearly and concisely, but he also provided his readers with useful citations to his sources, either by attributions in his Prologues or through footnotes. While Bello looked principally to Vattel for basic content and structure, he utilized more recent authors to bridge the gap between classical international commentators and the realities of the post-Napoleonic era. In the Prologue to the 1832 *Principios*, he particularly acknowledged his indebtedness to Joseph Chitty's *Treatise on the Laws of Commerce and Manufacturers and the Contracts*

³⁴ Plaza, loc. cit. above (p. 260 n. 23), at p. lxx.

³⁵ Prologue to the 1844 edition, Bello, op. cit. above (p. 260 n. 23), at p. 6.

³⁶ Bello gave no explanation of why he changed the title of the 1844 edition. A reference in the 1864 edition, however, indicates that he believed that 'international law' rather than 'law of nations' would be more acceptable in the future: Plaza, loc. cit. above (p. 260 n. 23), at pp. ciii-civ.

³⁷ Bello, op. cit. above (p. 260 n. 23), at p. 7.

³⁸ Plaza, loc. cit. above (p. 260 n. 23), at p. lxxii. The *Principios* had also been extensively plagiarized by José María de Pando in *Elementos de Derecho Internacional* (1843). Pando, a minor Spanish diplomat and would-be scholar, included nearly all Bello's 1832 edition in his own work without any alteration in wording or structure: Plaza, loc. cit. above (p. 260 n. 23), at pp. lxxii-lxxvi. Bello remained deeply disturbed by Pando's plagiarism up to the time of his death: Bello to Antonio Leocadio Guzmán, Santiago, 25 May 1865, in Bello, op. cit. above (p. 260 n. 23), Appendix IX, at p. 469.

³⁹ Espiell, 'Andrés Bello y su Proyección en el Derecho Internacional', *Revista Nacional de Cultura*, 43 (1982), pp. 299, 303.

Relating Thereto, which was published in London in 1824 when Bello was Secretary to the Colombian Legation, and to James Kent's *Commentaries on American Law*, first published in New York in 1826.⁴⁰ He also relied heavily on Jonathan Elliot's *Diplomatic Code*, and on Baron Charles de Martens' *Diplomatic Manual* for his section on diplomatic practice. Sources cited in footnotes also include the US Supreme Court Reports edited by Henry Wheaton between 1816 and 1827.⁴¹ As Bello explained, 'incorporating what I have taken from these sources with the doctrine of Vattel . . . and utilizing the works of other famous publicists, when I believed I had found useful suggestions in them, I have sought to put before my young countrymen a compressed but comprehensive view of the present state of the science [of international law]'.⁴²

Subsequent editions increased the list of sources, particularly those published in the US and England. Bello comments that when preparing the 1844 edition he had been able to consult works which he had previously only known by name, but which now, 'thanks to our Government's zeal in promoting learning, have taken the place they deserve in the libraries of the courts and Government ministries'.⁴³ Although he does not list the works in the Prologue, the footnotes refer frequently to Wheaton's *Elements of International Law*, first published in New York in 1836, as well as to the US Supreme Court Reports of Dallas and Cranch.

Bello is more explicit in the Prologue to his 1864 edition, and lists among his sources Robert Phillimore's *Commentaries on International Law* (1854, 1855, 1857, 1861), Carlos Calvo's 1861 Spanish translation of Wheaton's *History of the Law of Nations* (1861), A. G. Heffter's *Public International Law of Europe* (1857), James Reddie's *Researches on International Law* (1851), Antonio Riquelme's *Elementos de Derecho Público Internacional de España* (1847) and L. B. Hautefeuille's *Rights and Duties of Neutrals in times of Maritime Warfare* (1858).⁴⁴ The availability of these works to Bello in Chile, and the citations to Bello by William Lawrence Beach in his 1864 edition of Wheaton's *Elements of International Law*, suggests an intense interchange of ideas and books between Latin-American, US and European legal scholars by the middle of the nineteenth century.⁴⁵

Bello's most fundamental sources, however, were the impressions of his London years, which led directly to his theory of non-intervention.

⁴⁰ 'Those are the two works which have most frequently guided me in what I add to the general doctrine of the eighteenth-century publicists': Bello, *op. cit.* above (p. 260 n. 23), at p. 4.

⁴¹ Plaza, *loc. cit.* above (p. 260 n. 23), at pp. xciv–ci. Bello's deference to case law is unusual among Latin-American publicists, and may derive from his long exposure to the English legal system. Most of the cases cited relate to Admiralty and prize law, the rights of neutrals and the law of war.

⁴² Bello, *op. cit.* above (p. 260 n. 23), at p. 5.

⁴³ *Ibid.* at pp. 6–7.

⁴⁴ *Ibid.* at pp. 7–9.

⁴⁵ Bello corresponded with literary and scientific figures in the US, including George Ticknor and Joseph Henry, through whom he established a literary exchange programme between the Smithsonian Institute and the University of Chile: Bello, *Epistolario, Obras Completas de Andrés Bello*, vol. 14 (1981), at pp. 207, 208, 246, 314, 394.

VI. THE EQUALITY OF STATES AND NON-INTERVENTION

While in Europe Bello had viewed with increasing alarm the attempts of Austria, Prussia and Russia—and later France—to endeavour through the Holy Alliance to revive and maintain the pre-Napoleonic balance of power by crushing any challenges to restored monarchical legitimacy. Although England steadfastly refused invitations to join the Alliance, she could not prevent its members from resolving at the 1820 Congress of Troppau and later in 1821 at Laibach to intervene in Naples and the Piedmont to eliminate newly created republican institutions.

In London Bello undoubtedly read in the press of Lord Castlereagh's Circular Dispatch of 19 January 1821 protesting that the Naples intervention was founded upon principles 'such as could not be safely admitted as a system of international law . . . and might hereafter lead to a much more frequent and extensive interference in the internal transactions of states . . .'. Although the British Government, Castlereagh wrote, recognized a State's right to intervene in another State where its own immediate security or essential interests were imperilled, this right could only be 'justified by the strongest necessity'. Its exercise was an 'exception to general principles of the greatest value and importance', and such exceptions 'never can, without the utmost danger, be so far reduced to rule to be incorporated into the ordinary diplomacy of states, or into the institutes of the law of nations'.⁴⁶

Castlereagh's successor as Foreign Secretary, George Canning, similarly objected when Austria, Prussia and Russia at the 1822 Congress of Verona encouraged France to invade Spain to destroy the liberal constitution and restore King Ferdinand VII to absolute power. As Canning wrote to the Duke of Wellington, the British delegate to the Congress,

so convinced are His Majesty's Government of the uselessness and danger of any such interference—so objectionable does it appear to them in principle, and so utterly impracticable in execution—that if the necessity should arise, or . . . if the opportunity should offer, I am to instruct your Grace at once frankly and peremptorily to declare, that to any such interference, *come what may*, His Majesty will not be a party.⁴⁷

⁴⁶ *The Annual Register or a View of the History, Politics, and Literature of the Year 1820* (1822), vol. 52, pt. II, at pp. 737–9. Earlier Castlereagh had written that the alliance to defeat Napoleon 'was a union for the re-conquest and liberation of a great proportion of the Continent of Europe from the military dominion of France. . . . It never was, however, intended as a union for the government of the world, or for the superintendence of the Internal Affairs of other States': 'Circular of the British Cabinet, Communicated to the Several Courts of Europe, on the Subject of Intervention by Foreign Powers in the Internal Affairs of Other Countries, May, 1820', *Accounts and Papers* (36), *State Papers* (1847), vol. 69, at pp. 1, 3. According to R. Vincent, *Non-Intervention and International Order* (1974), at p. 83, 'It is possible to regard Castlereagh's interpretation of the principle of non-intervention as the keystone of a coherent foreign policy. It meant that Britain would intervene if an immediate threat to her security evidenced by aggression presented itself, but she would not do so on abstract and speculative principles of precaution.'

⁴⁷ Canning to Wellington, London, 27 September 1822, quoted in H. Temperley, *The Foreign*

Bello and his North American colleagues would find in Castlereagh's and Canning's pronouncements useful precedents for developing theories of non-intervention which would be directed against Great Britain as well as the nations across the Channel.

While still in London, Bello like many of his colleagues feared that once absolutism was restored in Spain the reactionary French monarch would aid his Spanish Bourbon cousin to reconquer Latin America, and perhaps even place Bourbon princes on thrones in Mexico and Peru. In a letter to the Chilean Minister of State and Foreign Relations dated 8 March 1823, he predicted that if the French intervention in Spain were successful in restoring the Inquisition and absolute monarchy, 'the Holy Alliance will declare itself openly against American independence, and France will doubtless assist Spain with arms, money and perhaps fleets of ships'.⁴⁸

Although France was ultimately victorious in Spain, Bello wrote to his Minister on 24 June 1824 in a slightly more optimistic vein. The 'loss' of Spain to a newly strengthened France meant that Britain must redress the balance by adhering more closely to the new States of Latin America. Therefore, recognition of Latin-American independence could not, he opined, be far distant. In a recent Parliamentary debate, he wrote, Canning had declared that recognition would be considered on a case-by-case basis and would depend on the progress each new nation made in consolidating its institutions and governments. Colombia, which was highly regarded in Britain, would be recognized during the current Parliamentary session, Bello predicted:

We have two anchors to assist us; the interests of the capitalists, merchants and manufacturers; and the administration's zealous opposition to the Holy Alliance's odious intervention in the internal affairs of other powers. On this last point, the unanimity of the Cabinets of St. James and Washington cannot but awaken the most favourable expectations in the friends of liberty of the human race.⁴⁹

Nevertheless, Bello observed that Spain was still dangerous. She was organizing a new army, negotiating purchases of warships and seeking loans to finance an expedition to Latin America. Although owing to British opposition the Holy Alliance might not intervene directly on Spain's side, France was sending secret agents to Latin America to

Policy of Canning 1822-1827 (1925), at pp. 64-5 (emphasis in original). Although Canning generally followed Castlereagh's non-intervention policy, he was forced to make an exception in the case of the Greek revolt against Turkish rule, and the allied intervention to preserve the balance of power in the Mediterranean led to destruction of the Turkish and Egyptian fleets at Navarino in 1827. 'The inability of the Turks to protect British commerce, popular sentiment in favor of the Greeks, and the ever-present threat of Russia made Castlereagh's course impossible for Canning': Vincent, *op. cit.* (previous note), at p. 87.

⁴⁸ *Op. cit.* above (p. 260 n. 23), Appendix III, pp. 429, 430. See Temperley, 'French Designs on Spanish America in 1820-25', *English Historical Review*, 40 (1925), p. 34.

⁴⁹ *Op. cit.* above (p. 260 n. 23), Appendix IV, at pp. 437, 439.

'exacerbate differences, buying the loyalty of some, and hypnotizing others with promises of promotions and honours'. While French statesmen were convinced that the colonies could never be recovered by force, they hoped that by discrediting popular government in Latin America they could persuade the Latin Americans 'to the establishment of thrones or at least of constitutions based on principles not dissimilar to those which today govern the policies of the cabinets of Europe'.⁵⁰

Canning's patience with French machinations had worn thin by October 1823, when he warned the French Ambassador Prince de Polignac that, while it was British policy to remain neutral during the Latin-American conflict, if any other power intervened 'it would be viewed as an entirely new question, and one upon which it must take such decision as the interests of Great Britain might require'. The Ambassador, recognizing the thinly veiled threat, disavowed on behalf of his Government any intention to intervene in the dispute between Spain and its colonies.⁵¹ Fourteen months later Canning announced his plan to negotiate trade and navigation treaties with Buenos Aires, Colombia and Mexico, thereby according them their long-awaited recognition.

Despite recognition by Great Britain and the US, Latin America's new independence was a shaky construction, troubled by internal violence and by persistent fears of foreign intervention. Moreover, while Great Britain and the US welcomed the new commercial and investment opportunities, the extent to which their assistance could be relied upon by the Latin Americans was uncertain. For example, Latin statesmen generally welcomed President James Monroe's famous declaration that any attempt by European powers to extend their political systems to the American continent would be considered dangerous to the peace and safety of the US. Initial enthusiasm cooled, however, when the US refused to enter into bilateral treaties with Latin-American nations incorporating the Monroe Doctrine's concepts of non-intervention and mutual protection.⁵²

The 1826 Panama Conference convened by Simon Bolívar also proved disappointing. The gathering had various objectives, including the creation among the Latin-American nations of a permanent network of treaties of confederation, alliance and commerce, an arbitration mechanism, the codification of international law, the formation of an alliance against Spain and the conversion of the Monroe Doctrine into a system of defensive collective action. Although all the Latin-American nations except Brazil had been invited, only Colombia, Mexico, Peru and the

⁵⁰ Op. cit. above (p. 260 n. 23), at p. 441.

⁵¹ 'Memorandum of a Conference between the Prince de Polignac and Mr. Canning, begun Thursday, October 9th, and Concluded Sunday, October 12th, 1823', in Webster, op. cit. above (p. 255 n. 9), vol. 2, at pp. 115, 116.

⁵² A. Whittaker, *The United States and the Independence of Latin America, 1800-1830* (1941), at pp. 533-60.

Central American Republic attended,⁵³ and the conference failed to achieve any lasting results.⁵⁴

As Secretary to the Colombian Legation Bello was well placed to observe both the fragility of Latin-American independence and the apparent inability of diplomacy to assure its preservation through defensive alliances and treaties. He sought, therefore, to strengthen the efforts of statesmen and diplomats to protect the new nations from outside interference by developing an internationally acceptable theory of non-intervention based upon European State practice and the writings of classical legal publicists, two sources of international law widely accepted in the early nineteenth century. As Bello admitted in the introduction to the 1832 edition of the *Principios*, he relied heavily on Vattel's *Le Droit de gens ou principes de la loi naturelle*, which, published in 1758, had become the statesman's Bible throughout the world.⁵⁵

⁵³ The US was invited as a 'neutral', and after a prolonged, bitter debate in the Senate two delegates were appointed: R. Saunders, 'Congressional Reaction in the United States to the Panama Congress of 1826', *The Americas*, 11 (1955), p. 141. One delegate, the US Minister to Colombia, died en route, and the other arrived after the sessions had ended: Whittaker, *op. cit.* (previous note), at pp. 564-84. Of the other European nations invited, only Great Britain and the Netherlands sent observers: Schoonhoven and de Jong, 'The Dutch Observer at the Congress of Panama in 1826', *Hispanic American Historical Review*, 36 (1956), p. 28. The British observer Edward Dawkins kept Canning informed of the delegates' discussions, which included a plan to purchase Spain's recognition of their independence and a defensive alliance to safeguard their new freedom from Spanish invasion, e.g. Dawkins to Canning, Panama, 10 June 1826, 5 July 1826 and 18 July 1826, Public Record Office, London, FO 97/115. See also Webster, *op. cit.* above (p. 255 n. 9), vol. 1, at pp. 410-13.

⁵⁴ e.g. the Treaty of Union, League and Perpetual Confederation signed by all the delegates was ratified only by Colombia. For discussion of the Conference's antecedents and the various treaties signed by the participants but never ratified, see M. MacKenzie, *Los Ideales de Bolívar en el Derecho Internacional Americano* (1955), pp. 21-57, and S. Inmann, *Inter-American Conferences 1826-1954: History and Problems* (1965), pp. 1-19. By the end of the 1820s the high expectations initially entertained in Britain for the Latin-American political experiment had been replaced in some quarters by cynicism and disdain. Thus, *The Annual Register*, commenting upon the failure of Latin-American statesmen to achieve any significant results at the 'pompous and futile' 1826 Panama Conference, had remarked scornfully: 'They speak and write like boys who have just left school, as if their minds had been stationary since they attained the age of puberty: they exhibit scarcely a single trace of a reason accustomed to observe human affairs, to analyse their combinations, or follow their consequences. For this defective turn of mind they are hardly responsible; the system of education, and the frame of society, which existed in the Spanish colonies were such as scarcely to permit statesman-like habits of thought to grow up': *The Annual Register or a View of the History, Politics and Literature of the Year 1826* (1827), at p. 420. Bello was living in London in 1826 so probably had read this remark and others similar to it. The prologue to the 1832 edition of his *Principios* reflects his desire to alter the educational system so as to produce the statesmen and leaders required by the post-independence era.

⁵⁵ e.g. during the June 1819 Parliamentary debates on the Foreign Enlistment Bill Vattel was cited by both the opponents and the supporters of more stringent restrictions on efforts to enlist soldiers and purchase munitions to aid the South American rebel cause: Hansard, *Parliamentary Debates*, vol. 40, cols. 1232, 1235, 1246-7, 1260, 1275 (Commons), 1413 (Lords). Future US President John Quincy Adams, advising a young man on the study of international law, wrote: 'Vattel is the author most commonly resorted to in practical diplomacy, and his work being written in a popular and easy style is among those that you will find the least tedious in reading': Adams to Christopher Hughes, Ealing, 25 December 1816, in W. Ford (ed.), *The Writings of John Quincy Adams* (1916), vol. 6, p. 129. Vattel was also appreciated in Latin America. In 1826 Colombian Vice President Francisco de Paula Santander, in order to frustrate Indian attempts to sell lands to foreign colonists,

Bello was undoubtedly attracted to Vattel because his thesis that freedom and independence of nations entitled every State to determine its form of government without outside interference had been formulated at a time when armed intervention was widespread in Europe. Prussia had recently invaded Silesia, France had intervened in Sweden and Prussia and Saxony had conspired to place a Saxon King on the Polish throne. Despite the contrary tide of current events, Vattel proclaimed that no foreign power could interfere with decisions concerning forms of government taken by other States or princes 'otherwise than by its good offices, unless requested to do it, or induced by particular reasons. If any intrude into the domestic concerns of another nation, and attempt to put a constraint on its deliberations, they do it an injury'.⁵⁶ Vattel thus provided Bello with a respectable European intellectual basis upon which to erect legal barriers against any post-Napoleonic armed interventions in Latin America.

According to Bello and to Vattel, just as all men are by nature equal so too self-governing nations—which are composed of men—are equal, independent and sovereign. New nations with these same qualities, Bello argued, can emerge either by colonization or by violent separation from their mother country. In the latter event, once *de facto* independence has been achieved and a government responsible for the conduct of its citizens established, older States 'cannot refuse to recognize it as a member of the community of nations'.⁵⁷ Expanding upon Vattel, Bello asserted that as a natural consequence of a State's independence and sovereignty—even if newly achieved as in Latin America—no other State could dictate its form of government or religion, or call it to account for its treatment of its own citizens.⁵⁸ Bello's writings outside the *Principios* indicate that

cited Vattel as authority for his assertion that nomadic tribes could not take exclusive possession of more lands than they required on which to live and grow their basic crops: *Gaceta de Colombia*, 19 February 1826, p. 1.

⁵⁶ E. de Vattel, *The Law of Nations or Principles of the Law of Nature applied to . . . Nations and Sovereigns* (ed. Chitty, 1839), p. 12. Elsewhere, Vattel wrote: 'it is an evident consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that no state has the smallest right to interfere in the government of another': *ibid.* at pp. 154–5.

⁵⁷ Bello, *op. cit.* above (p. 260 n. 23), at p. 36. He then summarized Canning's note of 25 March 1825 to the Spanish Ambassador justifying Great Britain's recognition of Latin-American independence. Canning had asserted that when a mother country had lost control over colonies which had established their independence, it could no longer be responsible for their acts. Therefore neutral nations must necessarily recognize the existence of the new nations and thereby bring them within the sphere of rights and duties which civilized nations must mutually observe and expect of each other: *ibid.* at pp. 37–8. The note is reprinted in *British and Foreign State Papers*, 12 (1824–5), at p. 909.

⁵⁸ Bello, *op. cit.* above (p. 260 n. 23), at p. 39. Bello thus adopted Vattel's assumptions about equality, sovereignty and independence and applied them to newly created States. Vattel also wrote: 'It is an evident consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that no State has the smallest right to interfere in the Government of another. Of all the rights that can belong to a nation, sovereignty is doubtless the most precious, and that which other nations ought most completely to respect, if they would not do her an injury': Vattel, *op. cit.* above (n. 56), at p. 155.

his strictures against intervention applied equally to the conduct of Latin-American nations among themselves.

Bello refined and tightened Vattel's generalized admonitions against intervention and cited recent specific examples of interferences by European States in each other's affairs which, he alleged, violated acceptable norms of State practice, including the Russian, Austrian and Prussian intervention which resulted in Poland's partition and the 1792 Prussian invasion of France. During the French Revolution, he wrote, 'there occurred several examples of this violation of the right which independent nations have to constitute themselves as they may deem best'. He condemned the 1821 Austrian action against Naples and the 1823 Holy Alliance-sponsored preventive intervention by France in Spain made 'under the pretext of suffocating the dangerous spirit of political innovations. Public opinion declared this type of intervention iniquitous and unjustified.'⁵⁹

Quoting with approval from Lord Castlereagh's 1821 Circular Dispatch warning the Holy Alliance against adopting intervention as a principle of international law, Bello concluded that while every State has a right to self-preservation and to take steps to protect itself 'against any danger', intervention in another State was such an exceptional remedy that the danger 'must be great, manifest, and imminent before we can use force to compel another State to change its institutions for our benefit'.⁶⁰ Bello's narrow test for the legitimacy of intervention contrasts sharply with Vattel's apparent toleration of foreign interventions not only when they were preceded by an invitation but also where they were 'induced by particular reasons'.

Even when a State deposes, exiles or executes its ruler or changes its line of succession, foreign powers have no right to intervene, Bello wrote. If the State's behaviour is unjust, it 'is responsible to no one for its actions as long as they do not infringe the absolute rights of other States, as in these cases they would not, because it cannot be presumed that,

⁵⁹ Bello, *op. cit.* above (p. 260 n. 23), at p. 39. See also R. Vincent, *Non-Intervention and Legal Order* (1974), p. 289: 'On the question of preventive intervention or anticipatory self-defence, the doctrine of contagion espoused by Holy Alliance as an explanation for and justification of intervention on behalf of legitimate governments, was not sanctioned in the writings of many international lawyers.'

⁶⁰ Bello, *op. cit.* above (p. 260 n. 23), at p. 39. Vattel had also written that a nation has a right to resist an injurious attempt, and to make use of force '... against whosoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor': Vattel, *op. cit.* above (p. 270 n. 56), at p. 154. Bello's criterion for judging danger to a State ('great, manifest and imminent') was much more precise. US Secretary of State Daniel Webster used similar language in correspondence following the *Caroline* incident. In 1837 British forces based in Canada had invaded US territory to destroy a ship supplying munitions to Canadian rebels. Lord Ashburton, the British Minister Plenipotentiary, sought to justify the British action as self-defence. Webster replied that 'Undoubtedly it is just, that, while it is admitted that exceptions [to non-intervention] growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation': quoted in J. Moore, *A Digest of International Law* (1906), vol. 2, p. 412.

while retaining its independence and sovereignty, it has surrendered its power to constitute and arrange its domestic affairs in the manner it considers best'.⁶¹ This passage was enlarged in the 1844 and 1864 editions by comments that other States had recognized French alterations in the royal succession when in 1830 the Bourbon dynasty was replaced by that of Orleans, and later, in 1848, when, after a republic was declared, the empire was restored through Napoleon III.⁶¹ Although Bello was writing of a State's rights to change a monarchical dynasty without outside interference, it is clear from the context that his comments would apply to alterations in other systems of government as well.⁶²

Bello derived particular inspiration for his passages on non-intervention from James Kent's *Commentaries on American Law* which was published in 1826, six years before Bello's first edition, when concern over foreign intervention—especially by Great Britain—was still widespread in the US. Kent, as Bello, founds his case against intervention on the equality and independence of States, pursuant to which 'no one nation is entitled to dictate a form of government, or religion, or a course of internal policy, to another'. Neither was a State 'entitled to take cognizance or notice of the domestic administration of another State, or of what passes within it as between the government and its own subjects'.⁶³ Kent then cites with approval Vattel's condemnation of the Spaniards for judging and executing the Peruvian Inca Atahualpa according to their own laws:

If he had broken the law of nations in respect to them, they would have had a right to punish him; but when they undertook to judge of the merits of his own interior administration, and to try and punish him for acts committed in the course of it, they were guilty of the grossest injustice.⁶⁴

After mentioning, as later would Bello, the interventions in Europe during the French Revolution, Kent condemns the invasion of Naples and Spain 'under the pretext of putting down a dangerous spirit of

⁶¹ Bello, *op. cit.* above (p. 260 n. 23), at p. 41.

⁶² While Bello also acknowledged Georg Fredrich von Martens as among his principal sources, he obviously parted company with the earlier author, who not only confined the international community to Europe, but whose disapproval of intervention was laden with exceptions. Thus, according to Martens, a State could intervene in a civil war 'to lend assistance to the party who he believes has justice on its side' and also where 'self preservation or an acquired right . . . may furnish him with a just motive . . .': *The Law of Nations being the Science of National Law, Covenants, Power, etc., founded upon the Treaties and Customs of Modern Nations in Europe* (4th edn., 1829), pp. 78–80 (first published in 1789).

⁶³ J. Kent, *Commentaries on American Law* (1826), vol. 1, p. 21. Fear of the Holy Alliance's intentions in the western hemisphere accounts for the widespread support throughout the nation which President Monroe's message received in the US: Falk, 'Some Contemporary Views of the Monroe Doctrine: The United States Press in 1823', *The Americas*, 12 (1956), pp. 183, 187–9.

⁶⁴ Kent, *op. cit.* (previous note), at pp. 21–2, citing Vattel, *op. cit.* above (p. 270 n. 56), at p. 155: 'The Spaniards violated all rules when they set themselves up as judges of the Inca Atahualpa. If that prince had violated the law of nations with respect to them, they would have had a right to punish him. But they accused him of having put some of his subjects to death, of having had several wives etc.—things for which he was not at all accountable to them: and to fill up the manner of their extravagant injustice, they condemned him by the laws of Spain.'

internal revolution and reform, as instances of the same violation of the absolute equality and independence of nations'. While Kent concedes that every State has a right to protect itself 'against distant as well as impending danger', in language similar to Bello he decides that intervention should only be invoked where the danger was 'great, distinct and imminent' and did not rest 'on vague and uncertain suspicion', citing Castlereagh's 1821 Circular Dispatch.⁶⁵

Kent's later editions contain additional examples of intervention, including the interference by the European powers against Turkey on behalf of the Greeks, the 1840 European intervention in the war between the Ottoman Porte and the Pacha of Egypt, and the 1830 involvement of the five great European powers in the Belgian revolution. Presumably because of their humanitarian aspects, Kent seems to have regarded these interventions as permissible, although he cautioned 'that non-interference is the general rule and cases of justifiable interference form exceptions, limited by the necessity of the case'.⁶⁶

Thus, surprisingly, the first American expression of the principle of non-intervention, which has been a constant irritant in US-Latin-American relations, may be attributed not to a Latin American, but to James Kent, a New York lawyer who had been a judge of the State Supreme Court and Chancellor of the Court of Chancery, and who had been greatly inspired by Vattel and early nineteenth century British foreign policy preferences as articulated by Canning and Castlereagh.⁶⁷ Andrés Bello, however, clearly acknowledged his indebtedness to the North American, and was the first publicist to express the doctrine in Spanish, thereby shaping the thoughts of generations of Latin-American jurists and statesmen whose combined and continuing efforts over time would produce the absolute ban on intervention contained in Article 18 of the Charter of the Organization of American States.⁶⁸

Beginning with the 1844 edition, Bello frequently cites Henry Wheaton's *Elements of International Law*, which first appeared in 1836. Wheaton in turn obviously relied heavily upon Kent for his section

⁶⁵ Kent, op. cit. above (p. 272 n. 63), at pp. 22-3.

⁶⁶ Kent, op. cit. above (p. 258 n. 16), at p. 26.

⁶⁷ The *Commentaries* became a textbook at West Point, Harvard and Yale. See J. Horton, *James Kent: A Study in Conservatism* (1939), p. 305: 'That a work should have influenced the public as it did, was possible only because of the place which lawyers had finally made for themselves in American life.'

⁶⁸ Although the *Principios* was the first Latin-American publication to propose a test against which to judge the legality of an intervention, a rule of non-intervention had been suggested earlier. In 1824 the Guatemalan official newspaper reprinted the international legal code suggested to the French National Convention in 1793 and 1795 by the revolutionary French Bishop Henri Gregoire, stating: 'this is a law of nations which reason and necessity should recommend to all nations, especially those in America'. Article 2 provides that 'nations are respectively independent and sovereign regardless of the number of individuals which compose them and the extension of territory which they occupy', while Article 5 asserts that 'every nation has the right to organize its own form of government'. Article 6 then states that 'no nation has the right to interfere in the government of another nation': *Gaceta del Gobierno Supremo de Guatemala*, No. 6 (14 April 1824), p. 43.

on non-intervention, but internal textual similarities also suggest the American's familiarity with Bello's work. Following Vattel, Wheaton divided his two-volume work into separate sections, 'The State of Peace' and 'The State of War'. He repeated the same historical examples of intervention mentioned by Kent and Bello, including the Castlereagh and Canning warnings to the Holy Alliance. Like Bello, Wheaton affirmed a State's legitimate right to augment its resources and power base by lawful means. If this increase were achieved so as to menace directly the security of other States, they might have a right to intervene, Wheaton concluded, citing examples from the Wars of the Reformation. Nevertheless, these instances could 'hardly be referred to any fixed and definite principle of international law, or furnish a general rule fit to be observed in other apparently analogous cases'.⁶⁹

Events following the French Revolution, Wheaton wrote, 'furnish a strong admonition against attempting to reduce to a rule, and to incorporate into the code of nations, a principle so indefinite and peculiarly liable to abuse in its practical application [as intervention]'.⁷⁰ Great Britain, he maintained, correctly dissented from the measures adopted by Austria, Prussia and Russia at the Congresses of Troppau and Laibach which 'were founded upon principles adopted to give the great powers of the European continent a perpetual pretext for interfering in the internal concerns of its different states'.⁷¹ Citing Castlereagh's Circular Dispatch, Wheaton concluded that such interferences were 'exceptional' and could never 'without the utmost danger . . . be incorporated into the ordinary diplomacy of states or into the institutes of the law of nations'.⁷² Moreover, since all nations were equally sovereign, no State could interfere with another's right to alter its form of government unless 'authorized by some special compact or by such a clear case of necessity as immediately affects its own independence, freedom and security'.⁷³ This language is somewhat similar to Bello's test whereby intervention could only be justified where the danger was clear, great and imminent.

Nevertheless, Wheaton would countenance intervention under treaty obligations, as when Great Britain sent troops to Portugal in 1826 to forestall a Spanish-sponsored attempt to overthrow the Government. He also approved of the military intervention of France, Great Britain and Russia in 1827 to secure the independence of Greece from Turkish rule. The incident provided 'a further illustration of the principles of international law authorizing such an interference, not only where the interests and safety of other powers are immediately affected by the internal trans-

⁶⁹ H. Wheaton, *Elements of International Law* (1836), p. 113. Wheaton's career and broad interests were similar to those of Bello. The North American had had a long diplomatic career in Europe, and also wrote on a variety of non-legal topics, including literature and history. Also like Bello he periodically revised and reissued his work up to the time of his death. The *Elements* (like the *Principios*) then appeared in several posthumous editions. See E. Baker, *Henry Wheaton, 1785-1848* (1937).

⁷⁰ Wheaton, *op. cit.* (previous note), at pp. 113-14.

⁷¹ *Ibid.* at p. 115.

⁷² *Ibid.* at p. 116.

⁷³ *Ibid.* at p. 131.

actions of a particular state, but where the general interests of humanity are infringed by the excesses of a barbarous and despotic government'.⁷⁴ Later versions of the *Elements* listed further examples of intervention, including the successful efforts in 1840 of Austria, Great Britain, Prussia and Russia to mediate in the conflict between the Turkish Sultan and the Pacha of Egypt to prevent the disintegration of the Ottoman Empire and the consequent disruption of the European balance of power.⁷⁵ Whether or not he would have regarded preservation of the balance of power by itself as a justifiable exception to the rule of non-intervention is unclear.

Bello's 1864 edition of the *Principios* enlarged upon the non-intervention sections of the prior versions. He again denounced preventive intervention, asserting elegantly that 'intervention caused by or on the pretext of a danger of a revolutionary contagion has almost always been disastrous, of fleeting effect, and seldom free from pernicious results'.⁷⁶ He then considers and discards other rationales for intervention, about the validity of which Wheaton in the US, and Sir Robert Phillimore in Great Britain, had been ambiguous.⁷⁷ He noted that one alleged justification for intervention was the prevention of bloodshed during prolonged and devastating civil wars, as in the Greek revolt against Turkish rule. While such interferences had occurred frequently, Bello admitted, a humanitarian justification alone could not legitimize intervention 'because it is plainly open to many abuses and leads to the violation of vital principles'.⁷⁸ He certainly would not have raised what he considered an 'exception' to the status of a principle of international law.

The 1864 *Principios* for the first time also examined the concept of

⁷⁴ Ibid. at p. 125: 'The rights of human nature wantonly outraged by this cruel warfare, prosecuted for six years against a civilised and Christian people, to whose ancestors mankind are too largely indebted for the blessings of arts and letters, were but tardily and imperfectly vindicated by this measure.' Utilizing an incredible logic, Wheaton next stated that the intervention had been justified 'by the great paramount law of self-preservation', since 'whatever a nation may lawfully defend for itself it may defend for another people if called upon to interpose': ibid. at pp. 129-30. The atrocities committed by the Turks were widely reported in the press and led to widespread public sympathy abroad for the Greek cause. The intervention, including the destruction of the Turkish fleet, therefore enjoyed enthusiastic public support. The parallels with Latin America are noteworthy. Both situations involved a struggle against despotic rulers and in both cases the British public invested in loans to the insurgents which soon went into default.

⁷⁵ Wheaton, *Elements of International Law* (ed. Dana, *The Classics of International Law Series*, No. 19, 1936), pp. 97-105.

⁷⁶ Bello, op. cit. above (p. 260 n. 23), at p. 41.

⁷⁷ Phillimore wrote that 'The Right of Self-Defence incident to every State may in certain circumstances carry with it the necessity of *intervening* in the relations, and, to a certain extent, of controlling the conduct of another State; and thus where the interest of the *intervener* is not immediately and directly, but mediately and indirectly, affected': R. Phillimore, *Commentaries upon International Law* (3rd edn., 1870), vol. 1, p. 554 (original emphasis). He then found that intervention had been sanctioned by State practice where territorial acquisition threatened the peace and safety of other States, on the 'just grounds . . . of self defence when the Domestic Institutions of a State are inconsistent with the peace and safety of other States', under a guarantee, by invitations, 'to preserve the balance of power', and to protect coreligionaries from persecution: ibid. at pp. 559-60.

⁷⁸ Bello, op. cit. above (p. 260 n. 23), at p. 43.

intervention by invitation in another State's political affairs—or civil wars—which Bello opined would be proper if the invitation were extended by both contending parties. The legality of intervention at the invitation of only one disputant was more doubtful, although 'it has been sanctioned many times by State practice', he admitted reluctantly.⁷⁹ Bello was similarly sceptical of interventions where 'a State may wish to extend its protection to its coreligionaries, who are subjects of another State professing a different faith'. In such situations Bello would only allow intervention if it were limited to negotiations or permitted by a treaty.⁸⁰ He rejects 'some writers' who would seem to tolerate armed intervention to prevent religious persecution, quoting von Martens's observation that religion has never been the sole cause of a war, that religious motives have always been subordinated to political considerations, and that in some instances the political objectives even have conflicted with alleged religious motivations.⁸¹

In a passage composed especially for the 1864 edition, Bello concludes that intervention to preserve a balance of power between States is similarly inexcusable. Indeed, Bello's basic premise was that States were absolutely equal, and any efforts to preserve a balance of power in favour of one or another group of States would necessarily impair the equality and independence of others. Every State, he wrote, has the right to augment its territory, population, wealth and power by legitimate means, and 'even the increase in its naval and military forces generally has been recognized as an undeniable right of sovereignty'. Such increases might, of course, endanger the security of other States, which could legitimately take steps to protect themselves against this threat to their security.

⁷⁹ Bello, op. cit. above (p. 260 n. 23), at pp. 43-4. In his poetry, however, Bello warned more bluntly against the perilous consequences of intervention by invitation: 'El Hombre, el Caballo i el Toro', reprinted in J. Torres Caicedo (ed.), *Colección de Poesías Originales por Andrés Bello* (1870), pp. 155-6, is a cautionary tale in verse of a horse which is badly gored by a bull. After a month the horse recovers and plots his revenge on the bull. He knows, however, that his hooves will be useless against the bull's horns. He therefore finds a man with a lance, and offers to carry him on his back so that he can kill the bull. The man agrees, puts a saddle on the horse, and together they ride off to vanquish the bull. After their victory the horse thanks the man and requests him to dismount and remove the saddle. The man refuses, claiming that he is now the horse's master. The poem ends on the following note:

'American Nations
If you ever forget that you are brothers
And stain with blood the common homeland,
Our dear mother, in a fratricidal duel,
Ah! Do not, by God, seek from foreign people
The expensive, deceptive, dangerous favour
More to be feared than the cruel enemy.
Don't you know what has been his custom?
To demand for payment
Eternal tribute and hard service.'

Rafael Caldera noted that Bello never wrote 'just for the sake of writing. Nearly all of Bello's poems were written with some object in mind: that poetry is the vehicle for the diffusion of thought': Caldera, op. cit. above (p. 254 n. 3), at p. 73.

⁸⁰ Bello, op. cit. above (p. 260 n. 23), at p. 44.

⁸¹ Ibid. at pp. 44-5.

When, however, 'there was no more than the fear of an eventual danger', any interference would be improper.⁸²

Bello also utilized the columns of *El Araucano* to refute any suggestion that intervention was an acceptable principle of international law or State practice rather than an exceptional remedy. During June 1840 he wrote three editorials attacking comments in Valparaíso's *El Mercurio* which had supported recent French armed intervention at Buenos Aires.⁸³ The dispute had begun in 1838 when Juan Manuel de Rosas, Governor of Buenos Aires and ruthless dictator of the United Provinces, refused to exempt French citizens from military service or to negotiate an agreement granting them the most-favoured-nation treatment accorded to British subjects in the 1825 treaty with Great Britain. The Paris government, which had embarked upon a general aggressive overseas policy designed to defuse domestic political opposition, welcomed the petty quarrel and sent French units to blockade the Río de la Plata. War seemed imminent, and the Chilean Government offered to mediate. *El Mercurio* opposed the projected mediation, which it argued might preserve the tyrannical Rosas Federalist regime from humiliating defeat by the French. Mediation would also weaken the opposition Unitarist Party, prominent members of which were then exiled in Chile.

Bello responded that the Chilean Government could not pass judgment on the internal policies of other States: 'It would be departing from the rules which have always guided its actions respecting neighbouring republics, if it intervened to make judgements between the federalists and the unitarists . . .'.⁸⁴ He then accused *El Mercurio* of suggesting that Chile withdraw its mediation offer and align itself against the party in power in Argentina to avoid offending the Unitarists. The result would be the bombardment of Buenos Aires and the occupation of Argentine territory by a European power: 'And seeing Argentina menaced by such great dangers, would it not be improper for a South American government, which could take measures to prevent them, to remain coldly aloof so that one party could take advantage of a national tragedy?'⁸⁵

Bello's fears that armed intervention could escalate into foreign occupation is even more clearly expressed in these editorials than in the *Principios*. Although the Rosas Government was undoubtedly an odious imposition upon the Argentine people, nevertheless it was the nation's legitimately constituted authority, and by continuing to treat with it Chile was only conforming 'to the principles of international law . . . principles which have a double importance in America, where it is necessary to treat them with particular and (if it were possible) superstitious respect, because without them the disturbances which are ruining the new

⁸² Ibid. at pp. 45-6.

⁸³ Reprinted in *Obras Completas de Andrés Bello*, vol. 10 (1954), Appendix XIII, at p. 529.

⁸⁴ Ibid. at p. 530.

⁸⁵ Ibid. at p. 531.

republics would provide frequent and plausible pretexts . . . to intervene and usurp'.⁸⁶

Unlike *El Mercurio*, Bello foresaw the inherent pitfalls in selective departures from legal principles. If Chile tolerated intervention against even the disreputable Rosas regime, it would create a precedent which at a later date might be directed against itself. *El Mercurio*, Bello warned, failed to foresee that if force were invoked by foreigners to redress injuries ' . . . little by little the matter becomes complicated; resentments are exacerbated; the war becomes bloodier; and from reprisals and blockades one proceeds to conquest and permanent occupation, which in the end is claimed to be the only possible reparation'. Rather than depend upon assurances from powerful States such as France that their interventionist goals were limited,

the surest of all guarantees is to live in peace with the great powers and, as far as possible, not provide them with any reason, any pretext, to interfere in the affairs of these new-born republics. The first intervention of a great maritime power in the reciprocal or domestic quarrels of our new States should be a sinister warning in the eyes of all good Americans, a foretaste of evils and calamities for many generations.⁸⁷

Fortunately, before the blockade escalated into more violence, France and Argentina concluded a treaty which assured French subjects of exemption from military service and the protection of their persons and property.⁸⁸

In 1846 Bello was offered another opportunity to express his opposition to intervention when General Juan José Flores, an exiled former Ecuadorian President, began recruiting a mercenary army in Europe to help him regain power. It was widely believed, however, that the expedition's real objective was to subjugate a large portion of South America and create a monarchy presided over by a Spanish prince. *El Mercurio* again attracted Bello's ire when it opined that indirect European intervention in Ecuador through support of the Flores expedition should be resisted because the foreign States were supporting an unjust cause. Bello protested in *El Araucano* that such a theory would permit foreign governments to intervene when they deemed a cause 'just', thereby enabling them to be the judge of their own actions, and 'reduce the American republics, and all other States in the same category, to a humiliating dependence upon the powerful States. There would always be an appeal to Europe against every governmental action.'⁸⁹

⁸⁶ Reprinted in *Obras Completas de Andrés Bello*, vol. 10 (1954), Appendix XIII, at p. 538.

⁸⁷ Ibid. at p. 540.

⁸⁸ J. Cady, *Foreign Intervention in the Rio de la Plata* (1929).

⁸⁹ Reprinted, op. cit. above (n. 86), Appendix XII, at pp. 511, 516-17. The Flores expedition is described in Hoskins, 'Juan José Flores and the Proposed Expedition Against Ecuador', *Hispanic American Historical Review*, 27 (1947), p. 467. The fear inspired by the Flores expedition led to the convening of the Lima Conference of 1847 to formulate a plan for mutual protection: S. G. Inman, *Inter-American Conferences 1826-1854: History and Problems* (1965), pp. 21-5. The Chilean delega-

In a passage reminiscent of the *Principios*, the second edition of which had appeared in Lima but two years previously, Bello challenged *El Mercurio's* assertion that intervention was a principle of international law, and insisted that 'the interference of one government in the private affairs of another is not a rule, but an exception; generally speaking it is illegitimate, and is an attack on the independence of States; it can only be justified by circumstances of a grave nature, of imminent and manifest danger'.⁹⁰ In the absence of those 'very rare cases of imminent and manifest danger', however, the only interference with the quarrels of other States which Bello would allow would be the offer of advice and good offices:

It is lawful for every government to mediate between belligerents, provided this is acceptable to the interested parties, and no attempt is made to convert the mediation into armed arbitration against the will of both or one of them. Otherwise there is no security nor true independence except for the powerful States.⁹¹

Neither the 1844 nor the 1864 *Principios* editions expanded Bello's original list of interventions to include inter-Latin-American examples, of which there had been many. Indeed, the Latin-American nations among themselves had always been among the most prominent practitioners of intervention. As early as 1817 Brazil invaded Uruguay. Later, Bolivian dictator Santa Cruz intervened with an armed force in Peru, producing in turn a Chilean counter-intervention in 1836-7, and other border disputes, invasions and warfare occurred with depressing frequency throughout most of the nineteenth century.⁹² Next to the personal ambitions of strong men, religion was perhaps the greatest cause of inter-Latin-American interventions as, beginning soon after independence, open conflicts between pro- and anti-clerical forces spilled over political frontiers. The problem was particularly acute in Central America:

Religion has been one of the most disturbing factors in the interstate relationships of the republics of Central America, whose histories are marked by an incessant struggle between pro- and anti-clerical forces. When conservative pro-clerical forces gained ascendancy in one of the Central American republics, they

tion proposed that the Conference concentrate on means to assure observance of 'the principles of law contained in the work of Andrés Bello': *The Inter-American System: Treaties, Conventions and Other Documents* (annotated by F. V. García-Amador, 1982), vol. 1: *Legal and Political Affairs*, pt. 1, at p. 58.

⁹⁰ Reprinted, op. cit. above (p. 277 n. 83), Appendix XII, at p. 511. See also p. 515: 'So wrong and dangerous is the principle proclaimed by *El Mercurio*, so repellent by its nature, so alarming and dangerous to the general security of nations, that . . . the powers which have practised it [intervention] and which have intervened in the affairs of others have attempted to justify their conduct in the eyes of the world not by reference to a general law, but to special and exceptional circumstances.'

⁹¹ Ibid. at p. 526.

⁹² The early beginnings of the rivalries among the Latin-American States are described in Seckingers, 'South American Power Politics During the 1820s', *Hispanic American Historical Review*, 36 (1956), p. 241. See also A. Alvarez, *La Diplomacia de Chile durante la Época de la Emancipación y la Sociedad Internacional Americana* (1910); A. Thomas and A. J. Thomas, Jr., *Non-Intervention: The Law and its Import in the Americas* (1956), p. 19 n. 23.

sought by intervention to establish pro-clerical governments in their neighbouring states. When the pendulum swung to the other extreme, the liberal anti-clerical governments adopted the same procedures.⁹³

Although lawyers and political scientists have tended to focus upon examples of European and US intervention in Latin America, these 'intra-family' interferences were of great concern to Latin-American statesmen, as evidenced by provisions in bilateral treaties agreeing either to refrain from intervening in each other's internal affairs, or to prevent the use of their territory to prepare armed incursions against neighbouring States. Thus, as early as 1831, the Definitive Treaty of Peace between Bolivia and Peru stipulated that neither party 'shall interfere, directly or indirectly, under any pretext whatever, in the internal affairs of the other . . .'.⁹⁴

Intervention was also specifically renounced in the 1845 Treaty of Amity and Alliance between Costa Rica and El Salvador, two nations which had been hostile to each other since the days of the Central American Republic. In Article 1 they agreed to recognize each other's sovereign right to govern themselves and structure their administrations as they saw fit, while Article 2 provided that 'Neither of the two will interfere for any reason in the internal affairs of the other . . .'.⁹⁵ Three years later Costa Rica and Guatemala agreed 'to respect mutually their respective freedom and independence, and not to intervene directly or indirectly in their internal affairs'.⁹⁶ A similar treaty renouncing intervention in each other's internal affairs was signed and ratified by Colombia and Ecuador in 1864.⁹⁷ Efforts to eliminate intra-Latin-American as well as foreign intervention through bilateral treaties were supplemented by the resolutions and declarations of international conferences in Latin America throughout the nineteenth century. The principal control device was the substitution of arbitration or mediation for the use of force.⁹⁸

Even if States did not attack each other directly, they often allowed their territories to be used by political refugees from neighbouring States to recruit troops to invade their States of origin. Bello, however, warned that political refugees should not abuse the hospitality of their host State 'to disturb neighbouring States. If they do so, the State where they reside can expel or punish them.' Moreover, tolerance of their actions 'could

⁹³ Thomas and Thomas, *op. cit.* (previous note), at p. 21.

⁹⁴ Article X: C. Parry (ed.), *The Consolidated Treaty Series* (hereinafter cited as *Consolidated TS*), vol. 82, pp. 239, 243.

⁹⁵ *Ibid.*, vol. 99, at pp. 231, 232-3.

⁹⁶ Treaty of Peace, Amity and Commerce, Article II: *ibid.*, vol. 102, at pp. 185, 187.

⁹⁷ Treaty of Peace and Additional Treaty, Article II: *ibid.*, vol. 129, at pp. 31, 34.

⁹⁸ The conferences subsequent to the 1826 Panama conference held at Lima (1847-8), Santiago (1856), Washington (1856) and Lima (1864-5) also sought to establish political unions or confederations as shields against foreign attempts to reconquer South America. Beginning with the meetings at Lima (1877-9) and Montevideo (1888-9) the emphasis was increasingly on codification of international public and private law, including Latin-American views on non-intervention, territorial jurisdiction, diplomatic asylum and the peaceful settlement of disputes: J. Yepes, *Del Congreso de Panamá a la Conferencia de Caracas, 1826-1954* (1955), vol. 1, at pp. 139-94, 203-8.

properly be viewed as a sign of ill-will [by other States] which could have grave results, and possibly as a breach of the peace.'⁹⁹

The need to resolve this constant problem was perceived as early as 1832, when in their Treaty of Friendship, Alliance and Commerce, Ecuador and Peru agreed that

Neither of the governments . . . shall allow persons, who have sought an asylum within its Territory, either in consequence of their political opinions or of acts resulting from these opinions, to attack the public safety of the Country to which they belong, by promoting sedition from the place where they reside.

Those found guilty of such behaviour would be transferred to the interior of the host country to a place which 'shall not be within 50 leagues of the said Frontiers'.¹⁰⁰ In 1840 Bolivia and Peru sought a similar solution in the preliminary Convention of Peace and Commerce in which they agreed they would not permit refugees who had found asylum in their territories ' . . . to attack the public security of the country to which they belong, by abetting conspiracies against it from the place where they reside . . .'.¹⁰¹ In 1855 Chile and the Argentine Confederation concluded a similar treaty,¹⁰² while two years later Ecuador and New Granada in their Treaty of Amity, Commerce and Navigation agreed not to provide assistance of any type to each other's enemies in times of war, 'nor to permit within their territory, the drafting and recruiting of men, the organization of troops or the arming and crewing of warships or corsairs' for hostile purposes in the territory of the other party.¹⁰³ Lamentably, this indirect intervention has persisted into the twentieth century despite attempts by inter-American conferences to reach binding agreements to eradicate the problem. In 1922-3 the Washington Conferences produced a multilateral convention in which the Central American nations again pledged that they would not allow their territory to be used as bases for attacks by political refugees on their home States.¹⁰⁴ The agreement did not last. Today, despite further treaties, Nicaraguan rebels use Honduran

⁹⁹ Bello, *op. cit.* above (p. 260 n. 23), at p. 117.

¹⁰⁰ Article XI: *Consolidated TS*, vol. 82, at pp. 463, 467. Article XII of the 1831 Definitive Treaty of Peace between Bolivia and Peru carried almost identical language, except that the place of internal exile was to have been 80 instead of 50 leagues from the frontier: *ibid.*, vol. 82, at pp. 239, 243-4.

¹⁰¹ Additional Articles, Article VI: *ibid.*, vol. 90, at pp. 103, 108. In 1848 the two nations signed another, more specific treaty, pursuant to which the Governments again agreed that they would not allow political refugees ' . . . to attack the public security of the country to which they belong, by giving encouragement to seditious movements from the place where they reside'. If political refugees were discovered plotting against their States of origin, the latter could complain to the host State which would remove them from the frontiers to a place 'which must not be at a distance less than 80 leagues from the said frontiers': Treaty of Friendship and Commerce, Article V, *ibid.*, vol. 102, at pp. 433, 434.

¹⁰² Treaty of Peace, Friendship, Commerce and Navigation, Article XXX: *ibid.*, vol. 113, at pp. 333, 368.

¹⁰³ Treaty of Amity, Commerce and Navigation, Article II: *ibid.*, vol. 117, at pp. 13, 19.

¹⁰⁴ Texts of the General Treaty of Peace and Amity and the other treaties and conventions signed at Washington are reprinted in *American Journal of International Law*, 17 (1923), Supplement, pp. 70-132. In 1907 another General Treaty of Peace and Amity between the Central American nations had attempted to resolve the same problem in Articles XVI and XVII: *Consolidated TS*, vol. 206, pp. 63, 75-6.

territory as staging areas for their incursions into Nicaragua. As a result, relations between the two neighbouring nations have been placed under great strain, thus confirming Bello's predictions.¹⁰⁵

Just as Bello did not provide examples of intra-Latin-American intervention in the *Principios*, neither did he allude to post-independence intervention in Latin America by the US or European powers. There is no reference to the US attack on the Falklands in 1831 or to the British occupation thereof in 1833. Nor does he refer to the 1838 French bombardment and landing at Vera Cruz, the 1845 Anglo-French blockade of the Rio de la Plata, British blockades and landings along Nicaragua's Mosquito Shore in 1842-4, the 1851 British blockade of the Salvadorean coast, or to the 1854 bombardment and destruction of Greytown, Nicaragua, by a US warship. Bello's failure to include these incidents as well as examples of intra-Latin-American intervention may be attributed to his belief that a reasoned theory of non-intervention derived from totally European precedents would be more appealing and convincing to potential intervening powers.¹⁰⁶

It is nevertheless remarkable that when Bello was preparing his last edition of the *Principios* he did not at least refer to the most spectacular Latin-American intervention of the nineteenth century, the 1861 invasion of Mexico by English, French and Spanish troops and the installation of Austrian Archduke Maximilian as Emperor. In 1863, however, the length and outcome of the Mexican occupation was still unclear, and Maximilian was not crowned until the following year. Nevertheless, as early as 1840 Bello had warned the Latin-American States in *El Araucano* that their surest guarantee against intervention was to avoid providing the most powerful nations with any legitimate pretexts to begin an intervention which could lead to permanent occupation.¹⁰⁷ By failure to protect alien lives and property, and by repeated foreign debt defaults, Mexico had broken the rules and was paying the consequences.¹⁰⁸

¹⁰⁵ In May 1986 Nicaragua brought actions against Honduras and Costa Rica in the International Court of Justice for allegedly allowing Nicaraguan rebels to use their territories as bases from which to attack Nicaraguan Government forces: ICJ Press Communiqué 86/10, 29 July 1986. The problem had been foreseen in 1894, when Nicaragua and Honduras in Article V of the General Treaty of Peace, Amity, Commerce and Extradition agreed, 'so that [political] asylum does not become injurious to either party, not to permit immigrants or political malcontents which from one of the two [nations] are in the territory of the other, to disturb the peace and security of the Republic from which they come or conspire against it': *Consolidated TS*, vol. 180, at pp. 477, 479.

¹⁰⁶ Bello was not therefore concerned with compiling a comprehensive list of European violations of Latin-American sovereignty such as Carlos Calvo would eventually produce in final form in his six-volume *Le Droit international théorique et pratique* (1896). A summary of these interventions, all allegedly in violation of the principles of the Monroe Doctrine as first enunciated in 1823, is provided in G. Nerval, *Autopsy of the Monroe Doctrine* (1934), pp. 155-81.

¹⁰⁷ Loc. cit. above (p. 277 n. 83), at p. 540.

¹⁰⁸ The first comprehensive legal analysis of the Mexican affair appeared in the year after Bello's death in Wheaton's *Elements* as edited by Charles Henry Dana: op. cit. above (p. 275 n. 75), at pp. 105-10 n. 41. After a lengthy account of the background to the intervention, Dana concluded that it had been a 'war of conquest', motivated not by prior treaty obligations but from a desire to obtain redress for injuries to aliens and their property: *ibid.* at p. 106.

The Mexican intervention began with the limited objectives of securing redress for aliens whose persons or property had been injured by years of civil war and revolution, or by default on certain government financial obligations. The intervening powers planned to seize the Vera Cruz customs house and utilize receipts to pay claimants, and in the 31 October 1861 Convention of London agreed not to use the intervention as a pretext for 'any acquisition of territory or any pecuniary advantage', nor to 'impair the right of the Mexican nation to choose and freely constitute the form of its own government'.¹⁰⁹ When it became apparent that the French had no intention of adhering to the London Convention but instead contemplated extended occupation, the Spanish and English Governments ordered their contingents to withdraw. The French forces marched inland and took Mexico City in June 1862.¹¹⁰

In the nineteenth century US and European statesmen differentiated between acceptable intervention for the purposes of protecting citizens and their property, and non-acceptable intervention to change a political system or to acquire territory. The Mexican episode illustrates the inherent weakness of this distinction. The ease with which 'limited' intervention could lead to territorial occupation had been foreseen by Bello. Indeed, he could have been discussing Mexico when he had predicted in the context of the French blockade of Buenos Aires that once force is employed by a foreign Government to obtain redress for injuries to aliens, even though its original goals are limited, '. . . little by little the matter becomes complicated; resentments are exacerbated; the war becomes bloodier; and from reprisals and blockades one proceeds to conquest and permanent occupation, which in the end is claimed to be the only possible reparation'.¹¹¹

The French attack upon Mexico marked a watershed in Latin-America's legal evolution. Its reverberations were felt throughout the continent, eclipsing even the trauma of the US-Mexican war in which only Mexico and the Caribbean had been immediately affected.¹¹² Between 1862 and 1867, however, a European nation had occupied

¹⁰⁹ Ibid. at p. 106.

¹¹⁰ Napoleon III of France, who since 1852 had been pursuing an aggressive, expansionist foreign policy, hoped to take advantage of US preoccupation with its own civil war to re-establish a French-controlled empire in America. He listened attentively in Paris to Mexican exiles who sought his support for a scheme to restore the Conservative Party to power through a French-backed monarchy which would bring stability to Mexico and assure prompt service of the foreign debt. His agents found a receptive candidate for the newly created post of Emperor of Mexico in Archduke Ferdinand Maximilian, younger brother of Austrian Emperor Franz Joseph: J. Haslip, *Imperial Adventurer* (1974).

¹¹¹ See p. 278 n. 87 above.

¹¹² Although the war with the US had cost Mexico one-third of its territory, 'it did not arouse anxiety in Latin America. Only Mexico and the Caribbean were noticeably affected. The countries further to the south were too far removed from the scene of the conflict and were too engrossed in their own national struggles against tyranny to give much heed to the writing on the wall. Domingo Faustino Sarmiento and Bartolomé Mitre, both of whom later became outstanding Presidents of Argentina, regarded the Mexican war as a mere boundary dispute without hemispheric significance': J. Crow, *The Epic of Latin America* (1980), p. 678.

Mexico, discarded its Constitution and republican form of government, and installed a Hapsburg prince on the throne of Moctezuma. The event revived the old apprehensions of the 1820s when French and Spanish decision-makers openly discussed establishing Bourbon monarchies in America. In response Latin-American leaders exchanged proposals for mutual defence treaties, and conferences were projected in Central America and Peru to discuss possible counter-intervention in Mexico.¹¹³

As in the 1820s, however, the Latin-American nations were too weak and disorganized politically to agree on effective defensive measures. During the latter half of the nineteenth century Latin-American scholars and legislators therefore sought to supplement Bello's doctrine of non-intervention by re-examining their obligations to aliens under the traditional interpretation of the law of State responsibility. Central to their efforts was the recasting of the Latin-American policy of equal treatment of nationals and aliens so as to frustrate alien attempts to evade the domestic legal system by invoking the diplomatic protection of their own governments, a device which often was the first step towards armed intervention.¹¹⁴ The *Principios* provided useful guidelines.

VII. THE LAW OF STATE RESPONSIBILITY AND THE RESTRICTION OF DIPLOMATIC PROTECTION

Even Bello's calm legal style cannot totally obscure the tensions and anxieties of the first forty years of Latin-American independence, when the carefully constructed new political entities were constantly besieged by internal and external violence. The passages in the *Principios* dealing with the relationship between host States and aliens, the jurisdiction of national tribunals, the exhaustion of local remedies and diplomatic protection must, like his comments on intervention, have been of urgent relevance to his audience.

In contrast to his treatment of intervention, however, Bello had no major contemporary commentator on whom to rely until Robert Phillimore produced the first edition of his *Commentaries on International Law* in 1851. Neither Kent nor Wheaton, for example, discussed exhaustion of local remedies or diplomatic protection in detail, perhaps because the US with its political stability and lack of an overseas empire did not often

¹¹³ In January 1864 Bolivia, Chile, Colombia, Ecuador, Peru, El Salvador and Venezuela signed a Treaty of Union and Defensive Alliance: *Consolidated TS*, vol. 130, at p. 401. See also R. Frazer, 'Latin American Projects to Aid Mexico during the French Intervention', *Hispanic American Historical Review*, 28 (1948), p. 377. It is significant that Carlos Calvo in his 1870 edition devoted 12 pages to the Mexican affair out of a total of 24 pages describing foreign interventions in Latin America: *Le Droit international théorique et pratique* (2nd edn., 1870), vol. 1, pp. 226-50.

¹¹⁴ As Professor Borchard wrote retrospectively in 1915, 'There seems little doubt that the great powers in their ready resort to ultimatums and threats of the use of force to exact the payment of pecuniary claims, particularly in Latin America, have often abused their rights and have inflicted gross injustice upon weak States': E. Borchard, *The Diplomatic Protection of Citizens Abroad* (1915), p. 447.

experience situations where these issues became relevant. For his 1832 and 1844 editions, therefore, Bello looked principally to Vattel, to his European experiences, and to his own perceptions of State practice as reflected in treaties and in domestic legislation.

(a) *The Equal Treatment of Aliens and Nationals*

In a complete reversal of Spanish colonial policy the new Latin-American nations sought to encourage aliens to contribute to their national development by the direct investment of their funds, talents and persons. To this end, for example, colonial legislation was amended to allow foreigners to own and operate mines in Mexico, while special laws were passed to encourage the immigration and settlement of aliens in Argentina, Central America and Colombia.¹¹⁵ Latin-American diplomats armed with special powers of attorney sailed to Europe to seek investment funds, and between 1822 and 1825 succeeded in placing over £20,000,000 in Colombian, Chilean, Argentine, Mexican, Central American and Peruvian bonds in the London market. During the same period concessions were granted to foreign entrepreneurs to operate steamboats, dredge for pearls, mint coins, manufacture paper and exploit the fabled gold and silver mines once monopolized by Spain. By 1827, over forty limited liability companies had been organized in England to operate mines and other enterprises in Latin America.¹¹⁶

Also in sharp contrast to Spanish policy, the Latin-American nations offered newcomers equal civil rights with their own nationals, while their new constitutions facilitated acquisition of citizenship. As the *London Morning Chronicle* noted in 1823 in relation to Colombia,

The old laws had completely excluded foreigners from the country, but the new ones give them all free entry and . . . respect everyone's religious feelings. Those old restrictive laws which once weighed heavily upon commerce, social intercourse and religious affairs, have disappeared . . . and industrious men, as well as professors of arts and sciences, are invited to go there and choose their residence in a country favoured by nature.¹¹⁷

¹¹⁵ e.g. in Guatemala the official newspaper remarked in 1825 that 'if the Spanish Government, in order to keep the new world dependent upon it, closed its doors and kept out the sons of other States, the new world must employ a different system in order to preserve its independence. "No foreigner", Philip II said, "may live in the Indies, nor go to it . . .". "In America", the new republics should say, "The sons of other nations who do not offend our religion, are not enemies of our independence and come to offer their industry, arms or talents will enjoy hospitality and be received with honour"': *Gaceta del Gobierno Supremo de Guatemala*, No. 40 (9 April 1825), p. 313.

¹¹⁶ J. Rippy, *British Foreign Investments in Latin America 1822-1949* (1959), pp. 17-26; L. Jenks, *The Migration of British Capital to 1875* (1917), at pp. 52-6; H. English, *General Guide to the Companies Working Foreign Mines* (1825); id., *A Complete View of the Joint Stock Companies Formed during the Years 1824 and 1825* (1827).

¹¹⁷ *The Morning Chronicle* (London), 18 August 1823, at p. 2, col. a. On 18 June 1823 a Colombian Executive Decree 'in order to promote the emigration of foreigners into this Republic', made between 2 and 3 million *fanegas* available for colonization by aliens. Article 5 provided that 'The Government being convinced of the utility which must result to the Republic from the establishment of foreigners, will grant to them privileges conformable to the Constitution and Laws of Colombia, according to

In some nations aliens who had fought against Spain automatically became citizens, or could easily qualify by marrying locally or fulfilling short residency requirements. The constitutions also promised equality of treatment of both citizens and nationals in the enjoyment of comprehensive lists of basic civil rights, including freedom of speech, assembly and expression, freedom from unreasonable searches and freedom from arbitrary arrest.¹¹⁸ The Chilean 1833 Constitution, for example, assured all residents of equality before the law,¹¹⁹ while the 1835 Ecuadorian Constitution and its numerous successors promised aliens the same security of persons and property as nationals.¹²⁰ The 1835 Central American Federal Constitution proclaimed that 'The Republic is a sacred asylum for all foreigners', who as 'inhabitants' would enjoy the same civil rights as nationals.¹²¹ Similar provisions were incorporated into the 1844 Costa Rican Constitution after the demise of the federal government.¹²² To the south, Peru in 1839 also had granted aliens the same civil rights as nationals as long as they assumed the same rights and duties as Peruvians.¹²³ Across the Andes the Argentine 1857 Constitution not only obliged the government to promote European immigration, but promised that aliens in Argentina would enjoy all the civil rights of citizens.¹²⁴

the profession or business with which they intend to occupy themselves': reprinted in English translation in *The Morning Chronicle*, 30 August 1823, at p. 3, col. d (one *fanega* equals approximately 1.59 acres).

¹¹⁸ One commentator has noted that there have been approximately two hundred Latin-American constitutions since independence: 'Thirteen countries have had ten or more each. Venezuela and the Dominican Republic take the honours for constitution-making, with over twenty each. On the average, Latin American constitutions endure less than twenty years': Busey, 'Observations on Latin American Constitutionalism', *The Americas*, 24 (1968), pp. 46, 48. Nevertheless, certain provisions, such as those relating to equality of treatment and submission to local laws, are generally repeated in succeeding documents even if the civil liberties promised are negated by provisions facilitating the imposition of states of siege and suspension of guarantees: F. Dawson and I. Head, *International Law, National Tribunals and the Rights of Aliens* (1971), pp. 79-84.

¹¹⁹ Article 12 (1): J. Prieto, *Constituciones y Leyes Políticas de la República de Chile Vigentes en 1881* (1881). Soon after arriving in Chile, Bello began drafting a Civil Code, which was finally accepted in 1857 and reflects his belief in the equality of treatment of nationals and aliens. Article 14 provides that the law is binding on all the inhabitants of the republic, including foreigners, while Article 54 stipulates that 'the law does not recognize any difference between the Chilean and the alien regarding the acquisition and enjoyment of the civil rights regulated by the Code': *Obras Completas de Andrés Bello*, vol. 12 (1954). Article 54 was subsequently adopted into the Civil Codes of Ecuador, Venezuela, Nicaragua, Uruguay, Honduras, El Salvador, Costa Rica, Panama and Brazil: Valladão, 'Andrés Bello y la Vigencia de sus Soluciones de Derecho Internacional Privado', in *Foro Internacional sobre la Obra Jurídica de Don Andrés Bello* (ed. Fundación La Casa de Bello, 1982), pp. 47, 50.

¹²⁰ R. Borja y Borja, *Derecho Constitucional Ecuatoriano* (1950), vol. 1, pp. 95-8.

¹²¹ Article 120: H. Peralta, *Las Constituciones de Costa Rica* (1962), p. 227.

¹²² Article 46: *ibid.* at p. 287. The 1838 Nicaraguan Constitution also provided in Article 15 that resident and transient aliens 'will enjoy all the guarantees provided by the Constitution in the same manner as nationals': E. Lejarza, *Las Constituciones de Nicaragua* (1958), p. 425.

¹²³ Article 178: *Constitución Política de la República Peruana dada por el Congreso General el Día Diez de Noviembre de 1839*.

¹²⁴ Articles 20, 25: A. Carranza, *Derecho Constitucional Argentino* (1905). Despite the benefits conferred on aliens by the Argentine and other constitutions, aliens generally did not enjoy political rights, and were not entitled to vote, hold public office or, in some cases, petition the government directly.

The *Principios* reflects the early, almost uncritical, Latin-American belief that economic development would necessarily flow from the alien presence. In a passage unchanged throughout his three editions, Bello opined in 1832 that those countries which had progressed furthest in the arts and commerce and 'which have attained the highest degree of wealth and power, are precisely those which have treated aliens with the most humanity and liberality'.¹²⁵ Nevertheless, economic and political considerations aside, as a result of 'the freedom and independence of States' each nation may legitimately refuse entry or impose restrictions on aliens, 'forbidding them to carry on certain professions or businesses, imposing taxes and special contributions . . .'.¹²⁶ These restrictions had to be made public, however, and could not be changed arbitrarily or without giving aliens a reasonable time in which to comply or to move themselves and their property elsewhere. Whatever the legitimate restrictions on aliens, Bello asserted that the State still was obliged to pay 'close attention to their security, dispensing justice in their lawsuits, and protecting them against the native-born [who are] too ready to mistreat and oppress them, particularly in countries with backward civilizations and cultures'.¹²⁷

(b) *Submission to Local Law and Jurisdiction*

Bello's insistence on a State's duty to provide for the basic security of aliens was balanced by his affirmation that upon entering a foreign State an alien 'agrees tacitly to be subject to the local laws and jurisdiction', in return for which 'the State offers him the protection of the public authority vested in the courts'.¹²⁸ The alien's obligation to submit to local laws and jurisdiction which was to be an important constituent of the late nineteenth century Calvo Doctrine thus was first expressed by Bello as early as 1832. His injunctions were repeated in the 1844 and 1864 editions, and a review of early and mid-century Latin-American constitutions and other legislation demonstrates that he was both describing current State practice and providing language for future draftsmen.

¹²⁵ Bello, op. cit. above (p. 260 n. 23), at p. 121.

¹²⁶ Ibid. Vattel had written that the sovereign can forbid entry to his country 'to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the State': Vattel, op. cit. above (p. 270 n. 56) (4th edn., 1811), p. 169.

¹²⁷ Bello, op. cit. above (p. 260 n. 23), at pp. 121-2.

¹²⁸ Ibid. at p. 122. Bello may have been partially relying on Kent, who in 1826 wrote: 'When foreigners are admitted into a state on free and liberal terms, the public faith becomes pledged for their protection. The courts of justice ought to be freely open to them to resort to for the redress of their grievances. But strangers are equally bound with natives, to obedience to the laws of the country during the time they sojourn in it, and they are equally amenable for infractions of the law': Kent, op. cit. above (p. 272 n. 63), at p. 36. Article 11 of Bishop Gregoire's code of international law provided that 'foreigners are subject to the laws of the country and may be punished by them': *Gaceta del Gobierno Supremo de Guatemala*, No. 6 (14 April 1824), at p. 43. This is still the accepted Latin-American view. As Judge Padilla Nervo opined in the *Barcelona Traction* case, 'Investors who go abroad in search of profits take a risk and go there for better or worse, not only for the better. They should respect the institutions and abide by the national laws of the country where they chose to go': *ICJ Reports*, 1970, at p. 250.

From their beginnings the Latin-American nations required aliens to submit to local laws as a condition of entry and in order to enjoy the privilege of equal treatment with nationals. The 1830 Venezuelan Constitution stated that all foreigners could freely enter Venezuela and 'just as they are subject to the same national laws as other citizens, they will also enjoy the same security of persons and property'.¹²⁹ The 1857 and 1858 Venezuelan Constitutions gave aliens equality with nationals in the enjoyment of the basic civil rights listed in those documents, and stated that aliens were subject, as were nationals, to the laws and authorities of the Republic.¹³⁰

In 1832 New Granada provided that foreigners and their property would enjoy the same civil rights and security as New Granadans 'provided they respect the laws of the republic'.¹³¹ Similar language appeared in the 1853 and 1858 Constitutions: 'Foreigners . . . will enjoy the same civil rights as Granadines, being subject like them to the laws and authorities of the country'.¹³² Significantly, the wording is similar to that of the *Principios*, which by 1858 had been published in both Caracas and Bogotá.

Ecuador's 1835 Constitution, and its 1843, 1845, 1852, 1867 and 1869 successors, expressly conditioned both aliens' admission to the country and enjoyment of civil rights upon respect for and obedience to the Constitution and laws of the Republic.¹³³ Costa Rica in 1844 also specifically stated aliens were subject to local laws,¹³⁴ while Mexico stressed as early as 1836 that aliens are entitled to all the rights of Mexicans 'and are required to respect the religion and subject themselves to the laws of the country in the appropriate cases'.¹³⁵

Bello's insistence that a host State was obliged to assure the rights of aliens through access to its courts was also confirmatory of State practice. Between 1825 and 1865 the Latin-American nations ratified over fifty treaties to provide equality of treatment on the basis of reciprocity for nationals and aliens in both commercial and non-commercial activities, and to guarantee them equal access with nationals to the administration of justice. Although the treaties were executed with a wide array of parties, ranging from global powers like Great Britain to basically commercial entities like the Hanseatic League, they all reflect an underlying assumption that aliens would wish to obtain access to local courts. Through the treaties aliens did indeed acquire a valuable privilege, since historically foreigners—especially in the Spanish colonies—were not

¹²⁹ Article 218: L. Otero, *Las Constituciones de Venezuela* (1965), p. 253.

¹³⁰ Article 113 in the 1857 Constitution: *ibid.* at p. 257; Article 29 in the 1858 Constitution: *ibid.* at p. 282.

¹³¹ Article 209: M. Pombo and J. Guerra (eds.), *Constituciones de Colombia* (1951), vol. 3, p. 303.

¹³² Article 8 in the 1853 Constitution: *ibid.*, vol. 4, at p. 8; Article 58 in the 1858 Constitution: *ibid.*, vol. 4, at p. 75.

¹³³ Article 107: Borja y Borja, *op. cit.* above (p. 286 n. 120), vol. 3, at p. 101.

¹³⁴ Article 46, Constitution of 1844: Peralta, *op. cit.* above (p. 286 n. 121), at p. 287.

¹³⁵ Article 12: J. Gamboa, *Leyes Constitucionales de México durante el Siglo XIX* (1901), at p. 358.

always accorded access to local courts under either national or international law.

The first treaty between a European power and a Latin-American State was the Treaty of Amity, Commerce and Navigation signed in February 1825 by the representatives of Great Britain and the United Provinces of Rio de la Plata, by which Canning accorded *de facto* recognition to the new nation.¹³⁶ The parties agreed to allow each other's traders and goods access to their ports and territories on the same terms as any other foreigners. In addition, subjects of one party in the country of the other were to be exempted from all compulsory military service, forced loans and 'neither shall they be compelled to pay any ordinary taxes under any pretext whatsoever, greater than those that are paid by Native Subjects or Citizens'. Moreover, in the administration of justice, the subjects of each party were to enjoy 'the same Privileges, Liberties and Rights, as the most favoured Nation'.¹³⁷ The following April Great Britain and Colombia signed a similar Treaty of Amity, Commerce and Navigation assuring their subjects access to the administration of justice on a most-favoured-nation basis. Like the Rio de la Plata Treaty, the parties' subjects were also exempted from military service and promised complete, undisturbed freedom of worship, provided it took place in 'private houses'.¹³⁸

The US, however, which had recognized the new Latin-American States before Great Britain, had already signed a General Convention of Peace, Amity, Commerce and Navigation with Colombia in October 1824.¹³⁹ This earlier treaty was more explicit than the English treaties in adopting the equality of treatment concept rather than the most-favoured-nation formula in the clauses relating to access to the administration of justice. Moreover, the US treaty, unlike the English treaties with Colombia and the Rio de la Plata, implicitly recognized the problems which could arise from revolutionary instability when it required the parties to give their 'special protection to the persons and property of the citizens of each other . . . leaving open and free to them the Tribunals of justice on the same terms which are usual and customary with the natives . . .'. Also, aliens were free to employ 'such advocates, solicitors, notaries and agents as they may judge proper in their trials at law', and had the right to be present at the court proceedings, examinations and judgments affecting them.¹⁴⁰

The US treaty with Colombia was followed in December 1825 by the General Convention of Peace, Amity, Commerce and Navigation wherein the US and the Federation of Central America agreed to accord

¹³⁶ *Consolidated TS*, vol. 75, at p. 75.

¹³⁷ Article IX: *ibid.* at p. 81.

¹³⁸ Article XII: *ibid.*, vol. 75, at p. 195. After Venezuela separated from Colombia, it signed a treaty in 1834 with Great Britain accepting, adopting and confirming *mutatis mutandis* 'the several articles and provisions' of the 1825 treaty: Article I, Convention of Amity, Commerce and Navigation, *ibid.*, vol. 84, at pp. 433, 437.

¹³⁹ Article 10: *ibid.*, vol. 74, at pp. 455, 462.

¹⁴⁰ Article 10: *ibid.* at p. 462.

their 'special protection' to the persons and property of the other party and to make their courts available to them 'on the same terms as are usual and customary for the natives or citizens of the country in which they may be, for which they may employ in the defense of their rights, advocates, solicitors, notaries, agents and factors, as they may judge proper, in all their trials at law'.¹⁴¹ Similar language was used in subsequent treaties to which the US was a party, including those with the Empire of Brazil (1828),¹⁴² Mexico (1831),¹⁴³ Chile (1832),¹⁴⁴ Venezuela (1836),¹⁴⁵ Costa Rica (1851),¹⁴⁶ Peru (1851)¹⁴⁷ and Paraguay (1859).¹⁴⁸

In December 1826 Great Britain signed a Treaty of Amity, Commerce and Navigation with Mexico basically similar to those signed in the previous year with Argentina and Colombia.¹⁴⁹ In the earlier treaties, however, the most-favoured-nation concept rather than equality of treatment was agreed as the yardstick by which to measure the treatment of aliens with respect to access to courts. Mexican negotiators, perhaps ultra-sensitive to foreign claims even at the early date owing to proximity to the US, insisted upon the more precise equality of treatment standard which became the general rule in future treaties. Moreover, neither of the earlier English treaties provides specifically for the protection of alien lives and property. The agreement with Mexico, however, suggests that Foreign Office draftsmen had reviewed the treaties between the US and Colombia and the Central American Federation, for Article 8 provides that citizens of each party should enjoy 'full and perfect protection for their persons and property, and . . . free and open access to the Courts of Justice . . . for the prosecution and defence of their just rights, and they shall be at liberty to employ, in all causes, the Advocates, Attorneys or Agents, whom they may think proper; and they shall enjoy in this respect the same rights and privileges therein, as native citizens'.¹⁵⁰

Other subsequent treaties to which Great Britain was a party followed the same form of language, requiring specifically that aliens be accorded protection by the host State and be given access to courts on the same

¹⁴¹ Article 12: *ibid.*, vol. 76, at pp. 433, 441-2.

¹⁴² Treaty of Peace, Friendship, Commerce and Navigation, Article 12: *ibid.*, vol. 79, at pp. 249, 258.

¹⁴³ Treaty of Amity, Commerce and Navigation, Article 15: *ibid.*, vol. 81, at pp. 381, 391-2. In this case 'the protection of the Government' was substituted for 'special protection'.

¹⁴⁴ Treaty of Peace, Amity, Commerce and Navigation, Article X: *ibid.*, vol. 82, at pp. 413, 420-1.

¹⁴⁵ Treaty of Peace, Friendship, Navigation and Commerce, Article 13: *ibid.*, vol. 86, at pp. 1, 9-10.

¹⁴⁶ Treaty of Friendship, Commerce and Navigation, Article XII: *ibid.*, vol. 106, at pp. 91, 102-3.

¹⁴⁷ Treaty of Friendship, Commerce and Navigation, Article XIX: *ibid.*, vol. 106, at pp. 143, 156-7.

¹⁴⁸ Treaty of Friendship, Commerce and Navigation, Article IX: *ibid.*, vol. 120, at pp. 239, 246.

¹⁴⁹ *Ibid.*, vol. 77, at p. 39.

¹⁵⁰ Article 8: *ibid.* at p. 47. The treaty was reported in *John Bull*, which remarked that 'it agrees in so many points with those of the States of La Plata and the Republic of Colombia, that it is only necessary for us to give an abstract': *John Bull* (London), 14 August 1825, at p. 258, col. a.

basis as nationals.¹⁵¹ Latin-American treaties with other European States were similar, such as those between Bolivia and France (1834),¹⁵² the Dominican Republic and Denmark (1851),¹⁵³ Argentina and Belgium (1860),¹⁵⁴ Peru and Belgium (1860)¹⁵⁵ and Colombia and the Netherlands (1829).¹⁵⁶

Treaties among the Latin-American nations themselves assured aliens of equal treatment with nationals and therefore equal access to courts. Chile and the United Provinces of Rio de la Plata agreed as early as 1826 that their citizens would enjoy in each other's territory 'the same rights and privileges which the laws grant, or may in future grant, to the natives of the country in which they reside'.¹⁵⁷ Bello, who participated in the drafting of all Chile's major diplomatic documents after 1829, enshrined the equality principle in subsequent treaties. Thus, an 1831 Treaty provided that immediately upon entering each other's territory, Mexicans and Chileans 'shall enjoy the same respect, rights and privileges as are lawfully enjoyed in each respective country by those who have obtained letters of naturalization . . .',¹⁵⁸ and in 1835 Chile agreed with Peru that the citizens of each party will enjoy 'all the civil rights and protection granted to the Natives by law'.¹⁵⁹ Similar treaties were enacted between Bolivia and Peru (1831),¹⁶⁰ Mexico and Peru (1832)¹⁶¹ and Bolivia and Ecuador (1842).¹⁶² The 1848 Treaty of Peace, Amity and Commerce between Costa Rica and Guatemala, in addition to exempting aliens from forced loans and compulsory military service and assuring them access to courts on the same basis as nationals, also promised that they would enjoy 'a constant and complete protection in their persons and properties'.¹⁶³ In 1855 Brazil and Paraguay similarly agreed that each other's citizens and their property would be accorded 'full and perfect protection'.¹⁶⁴

The language in these early treaties promising protection to foreign

¹⁵¹ For example, the 1837 Treaty of Amity, Commerce and Navigation with the Peru-Bolivian Confederation, Article VIII: *Consolidated TS*, vol. 87, at pp. 1, 8; the 1850 Treaty of Friendship, Commerce and Navigation with Peru, Article XIII: *ibid.*, vol. 104 at pp. 27, 37-8; the 1860 Treaty of Friendship, Commerce and Navigation with Nicaragua, Article XIII: *ibid.*, vol. 121, at pp. 363, 373. The 1851 Treaty of Friendship, Commerce and Navigation with Ecuador, however, retained the most-favoured-nation concept and followed the precedents of the Colombian and Rio de la Plata treaties: *ibid.*, vol. 105, at p. 429.

¹⁵² Treaty of Amity, Commerce and Navigation, Article III: *ibid.*, vol. 84, at pp. 487, 492.

¹⁵³ Treaty of Friendship, Commerce and Navigation, Article II: *ibid.*, vol. 107, at pp. 201, 203.

¹⁵⁴ Treaty of Friendship, Commerce and Navigation, Article 4: *ibid.*, vol. 121, at pp. 417, 420-1.

¹⁵⁵ Treaty of Friendship, Commerce and Navigation, Article III: *ibid.*, vol. 121, at pp. 401, 402.

¹⁵⁶ Treaty of Friendship, Navigation and Commerce, Article 14: *ibid.*, vol. 79, at pp. 379, 385-6.

¹⁵⁷ Treaty of Friendship, Commerce and Navigation, Article 7: *ibid.*, vol. 76, at pp. 481, 484.

¹⁵⁸ Treaty of Friendship, Commerce and Navigation, Article 2: *ibid.*, vol. 81, at pp. 261, 263-4.

¹⁵⁹ Treaty of Friendship, Commerce and Navigation, Article III: *ibid.*, vol. 85, at p. 35.

¹⁶⁰ Definitive Treaty of Peace, Article VIII: *ibid.*, vol. 82, at pp. 239, 243.

¹⁶¹ Treaty of Amity, Commerce and Navigation, Article II: *ibid.*, vol. 83, at pp. 81, 83-4.

¹⁶² Treaty of Friendship and Alliance, Article II: *ibid.*, vol. 93, at pp. 175, 176.

¹⁶³ Treaty of Peace, Amity and Commerce, Article 4: *ibid.*, vol. 102, at pp. 185, 188.

¹⁶⁴ Treaty of Friendship, Commerce and Navigation, Article VIII: *ibid.*, vol. 113, at pp. 99, 102.

citizens and their property suggests that the intention was to provide aliens and their goods with treatment equal to if not better than nationals.¹⁶⁵ Phrases such as 'special protection', 'full and complete protection', 'full and perfect protection', 'most complete protection and security' and 'complete and constant protection' are but some of the combinations utilized in over thirty treaties. Their repeated invocation confirms that under customary international law aliens are as a minimum entitled to equal protection with nationals of their persons and property, as well as access to courts to defend and assert their rights on the same basis, just as Bello insisted.¹⁶⁶

It is unlikely that Bello would have interpreted 'special protection' to mean more than equal treatment. The 1832 Treaty of Peace, Amity, Commerce and Navigation with the US, which he helped negotiate, contained the usual clause on access to the courts on the same basis as nationals. An Additional and Explanatory Convention, signed by Bello and the US plenipotentiary, however, sought to limit the right of US nationals to be present, in person or by representative, at any judicial proceeding concerning them. While Americans were to enjoy all the rights and benefits which the law granted or might grant to Chileans in judicial proceedings, they were entitled to 'no special favours or privileges'.¹⁶⁷

The 1854 Chilean Treaty with Great Britain, in the preparation of which Bello was involved, similarly clearly indicates that equal treatment was the intended standard. Article 8 provided that subjects of the two signatories 'shall receive and enjoy the same full and perfect protection for their persons and property which is dispensed to native subjects and citizens'.¹⁶⁸

¹⁶⁵ Despite superficial differences in wording, the treaties generally promised aliens:

- (a) protection of their persons and property;
- (b) recourse to judicial remedies on the same basis as nationals;
- (c) exemption from compulsory military service and forced loans;
- (d) taxation on the same basis as nationals;
- (e) freedom of worship and the right to decent burial in either public or private cemeteries;
- (f) the right to acquire and dispose of personal property on the same basis as nationals;
- (g) the right—limited in some cases—to acquire real property and dispose of it under special conditions.

¹⁶⁶ One recent commentator, studying post-First World War treaties, concluded that in some cases the obligation to provide 'special protection' was a reference to the degree of protection required by international, rather than domestic, law. He was, however, referring to a clause which appeared in twelve friendship, commerce and navigation treaties concluded by the US, and which promised that aliens should enjoy 'the most constant protection for their persons and property, and shall enjoy in this respect that degree of protection which is required by international law': R. Wilson, *The International Law Standard in Treaties of the United States* (1953), p. 92.

¹⁶⁷ Article 2: *Consolidated TS*, vol. 82, at pp. 413, 440.

¹⁶⁸ Treaty of Friendship, Commerce and Navigation: *ibid.*, vol. 112, at pp. 215, 221–2. Bello defended an earlier draft of the treaty from critics in an editorial in *El Araucano*. As he pointed out, by placing Great Britain on a most-favoured-nation footing, Chile would concede nothing, 'because the policy of our government is one of equality; there is not in our markets, nor in our administration of justice, nor in the movement of commercial property among us, a foreign nation which enjoys

(c) *The Law of State Responsibility*

Bello does not discuss specifically an international standard of justice to which host States must adhere in their treatment of aliens. Nevertheless he wrote in his first edition that just as aliens are obliged to respect local laws, so the State is likewise obliged to obey the requirements of domestic legislation in its dealings with aliens 'and in the case of an obvious violation' (*manifiesta infracción*), the injury to the alien 'is an injury to the society of which he is a member'.¹⁶⁹ Thus Bello accepted the Vattelian theory of vicarious liability whereby an injury to an alien is tantamount to an injury to his State:

Whosoever uses a citizen ill, indirectly offends the State, which is bound to protect this citizen; and the Sovereign of the latter should avenge his wrongs, punish the aggressor and, if possible, oblige him to make full reparation.

According to Vattel, if a Sovereign allowed his subjects 'to injure a foreign nation either in its body or its members, he does no less injury to that nation than if he injured it himself'.¹⁷⁰ But, Vattel acknowledged, even the best regulated State could not always control its citizens. Therefore the State could only be held responsible if it 'approves and ratifies the act of the individual' or refuses 'to cause reparation to be made for the damage done by his subject, or to punish the offender, or, finally, to deliver him up . . .'.¹⁷¹ Indeed the Sovereign was under a duty to punish his offending subject or have reparation made at the risk of becoming an accomplice to his action and thereby responsible for it.¹⁷²

Vattel, however, was addressing solely the problem of State responsibility for injuries to aliens committed by its own subjects. Bello extended the theory to include acts committed against aliens by the State as well. If a State 'instigates, approves or tolerates acts of injustice against aliens, it makes them truly its own and becomes responsible for them as against other nations'.¹⁷³ In 1864 Bello revised his text to recognize more explicitly the right of a State to defend its subjects from the acts of other States without reference to a transferred or symbolic injury even in cases arising out of contract:

The protection of its subjects is an undeniable right of every Sovereign State when their persons or interests have been injured by the Government of another State, and especially in the case where their financial claims arise out of contracts executed with the foreign sovereign or its legally authorized agents.¹⁷⁴

Although Bello made this assertion in a section dealing with the obligations of States and their successors to honour agreements with foreign

special favours'. In return, Chile would receive the right to trade with the English colonies, particularly Australia: 'Tratado con Gran Bretaña', loc. cit. above (p. 277 n. 83), Appendix XIX, pp. 591, 592, 603.

¹⁶⁹ A. B., *Principios de Derecho de Gentes* (1832), p. 55.

¹⁷⁰ Vattel, op. cit. above (p. 270 n. 56), at p. 161. ¹⁷¹ Ibid. at p. 162.

¹⁷² Ibid. at p. 163.

¹⁷³ A. B., op. cit. above (n. 169), at p. 55.

¹⁷⁴ Bello, op. cit. above (p. 260 n. 23), at p. 47.

private lenders, he also added in the same paragraph that 'the same is applicable to indemnities owed by the foreign State as a result of an injury committed by it or by persons acting legally in its name'. A State would not, however, Bello wrote, be responsible to aliens if it had not brought about the injury by its own actions or through those of its agents, or if it had not somehow endorsed the acts of individual perpetrators. Bello thus provided general guidelines for the allocation of State responsibility for injuries to aliens incurred in revolutions or civil disturbances, one of the principal sources of nineteenth-century alien claims.

Unfortunately the good intentions of Latin-American statesmen as evidenced in constitutions, legislation and treaties could not stem the political disintegration which followed independence, and claims for compensation by aliens whose persons or property had been injured in revolutionary upheavals became increasingly frequent. As an alternative to the national bankruptcy which would result if responsibility for all alien claims were assumed, and as a logical extension of the equality of treatment doctrine reflected in Bello's writings and in State practice, host States eventually sought by legislation to restrict the avenues of available pecuniary redress to those open to nationals. One of the earliest legislative attempts to deal with compensation claims for revolutionary damages occurred in Central America. Its genesis illustrated in microcosm the problems which later would afflict larger Latin-American States when they discovered that the new, carefully drafted constitutions, laws and treaties could not prevent hardship to aliens whom they had encouraged to immigrate to and invest in their new nations, and to whom they had promised security for their persons and property.

In January 1824 the Government of the United Provinces of Central America issued a Decree for the Encouragement of Foreigners Resorting to the United Provinces of Central America.¹⁷⁵ Spanish legislation 'which prohibited the working of the mines by foreigners was repealed, and immigrants were offered export duty exemption and the right to import agricultural and mining machinery duty free. Unfortunately the optimistic view of the future suggested in the Decree was unwarranted. The Central American federation was soon torn by civil war, and in November 1829 Congress was forced to establish a commission to compensate individuals whose property had been taken or destroyed by revolutionary forces, or who had been injured or imprisoned.¹⁷⁶ Claims by nationals and aliens alike could be considered by the commission, but without any reference to the requirements of international law. Alien claims would, however, be entitled to 'special consideration' if they had rendered

¹⁷⁵ *British and Foreign State Papers*, 12 (1824-5), at p. 979. In October 1823 Mexico had suspended Spanish laws forbidding foreigners to operate mines: *Colección de Tratados con Naciones Extranjeras* (1854), vol. 3, p. 84.

¹⁷⁶ Decreto de Noviembre 25, 1829: Public Record Office, London, FO 15/10.

'important services to the nation'.¹⁷⁷ No evidence of any awards has yet been found and continued revolutionary violence so increased the backlog of pending claims all over Latin America that by mid-century not only Guatemala but all other Latin-American governments were defending themselves by asserting as a matter of international law that in the absence of complicity or consent States were not accountable for the acts of rebels or rioters.¹⁷⁸

In 1852 Bello, as the principal legal officer of the Chilean Ministry of Foreign Affairs, articulated clearly the Latin-American position in a reply to a complaint from the French chargé d'affaires concerning the claims of French citizens injured in a recent disturbance.¹⁷⁹ Bello pointed out that under international law, once an alien had entered a country he was entitled to no more than the protection of his person and property: 'It is not difficult to demonstrate how far this protection and security extends, and to what extent an alien can demand it.' Since the alien becomes by settlement an inhabitant of the country he enters, Bello reasoned, it is as an inhabitant, not as an alien, that he is entitled to protection. Moreover, since in some cases the protection accorded to inhabitants might justifiably be less than that given to a citizen, when a State elevates the protection it gives aliens to that accorded to citizens 'it has carried its liberality, its generosity, to the furthest extent, and the alien cannot expect any more'.¹⁸⁰ Foreigners can only expect that the protection be given 'according to the circumstances of the country, and in the most favourable case, equal with that accorded citizens'. A country has sufficiently complied with international law if protection is given 'in good faith, in a good spirit'.¹⁸¹

No one, Bello wrote, would expect a State to secure aliens against calamities such as floods and earthquakes which might afflict a country and all its inhabitants indiscriminately. Likewise, everyone is exposed to the dangers of robbery and assault because there is no country which

¹⁷⁷ Ibid. at Article 10. During 1830 British Consul Dashwood in Guatemala spent considerable time seeking relief for British claimants who had been injured or imprisoned or whose property had been destroyed during civil wars and revolutions. For example, he protested vigorously to the Guatemalan Minister of Foreign Relations when civil and military authorities detained two British vessels: Dashwood to Ibarra, Guatemala, 26 March 1830, Public Record Office, London, FO 15/10. Ibarra answered that the incident had been caused by a revolutionary faction which had since been defeated. In the future, he wrote, 'both the subjects of H. B. Majesty as well as their property will . . . enjoy the guarantees offered them by international law . . .': Ibarra to Dashwood, Guatemala, 2 April 1830, *ibid.*

¹⁷⁸ Borchard, *op. cit.* above (p. 284 n. 114), at pp. 242-5. The opinions of the Legal Advisers to the Foreign Office for the period 1825-60 illustrate the wide variety and numbers of claims for which British subjects in Central America sought the interposition of their government. They included claims arising out of forced loans, unjust imprisonment, 'gross denials of justice' and for property seized or damaged in revolutions. See the collection of opinions in C. Parry (ed.), *Law Officers' Opinions to the Foreign Office 1793-1860*, vols. 17 and 18.

¹⁷⁹ Bello to Cazotte, Santiago, 29 December 1852: Bello, *Derecho Internacional*, vol. 4, *Obras Completas de Andrés Bello*, vol. 13 (1981), at p. 490.

¹⁸⁰ Ibid. at p. 491.

¹⁸¹ Ibid. at p. 492.

does not have criminals. Aliens, as in their own countries, could suffer accordingly:

The protection for aliens in these cases is that which an inhabitant or at best a citizen, can demand, that is, that the criminal be prosecuted, be punished, and that the door be opened so that the guilty parties may be sued for the indemnification which as perpetrators of the evil they are obliged to pay. . . . This country has given the French the same protection as Chileans, which is the most that can be demanded.¹⁸²

Vattel, Bello notes, denies that a sovereign must compensate his subjects for damage received in wartime. Moreover, under traditional international law, Bello observes, citing Grotius, a State is not responsible for the acts of private individuals unless with knowledge of the circumstances it could have prevented the act, or permitted it to happen, or when it 'supports and helps the perpetrator of the acts so as to assure him of immunity'.¹⁸³

The French chargé's contention that compensation to aliens injured in civil commotions was normally accorded under State practice was similarly refuted. Some weak States, Bello agreed, out of 'prudence' had offered compensation to citizens of more powerful States, 'but so that the practices which are cited [by the chargé] may support the principle [of compensation] it is necessary that the compensation have been given not in response to claims by a strong and powerful State against a weak one . . ., but between countries of equal or approximate political importance'.¹⁸⁴ The only example of such a case went against the French

¹⁸² Ibid. Thus Carlos Calvo was undeservedly given credit for originality when he restated the equality of treatment doctrine and proclaimed that when aliens entered a country they have the right to the same protection as nationals, but 'they ought not to lay claim to a protection more extended': Calvo, op. cit. above (p. 282 n. 106), vol. 6, at p. 231, quoted and translated in D. Shea, *The Calvo Clause* (1955), at p. 18. Bello had already made the position clear in his correspondence with Cazotte and in the *Principios*. Professor Borchard later wrote that Calvo's assertion that aliens should be subject to local law and resolve their disputes in municipal courts 'has given the Spanish-American countries a basis to assert the doctrine that in private litigation the alien must exhaust his local remedies before invoking diplomatic interposition and that in his claims against the State he must make the local court his final forum': Borchard, op. cit. above (p. 284 n. 114), at p. 793. It is submitted that Bello, not Calvo, provided the Latin Americans with the 'basis' to which Professor Borchard refers.

¹⁸³ Bello to Cazotte, op. cit. above (p. 295 n. 179), at p. 493. Contemporary British legal opinion agreed with Bello. On 20 August 1848 the Crown's Law Officer, Mr Dodson, wrote to Palmerston that 'the Government of Guatemala cannot be held responsible for all losses sustained by British subjects through the violence of Insurrectionary Mobs in that country, but I think that such responsibility does justly attach to the Government whenever it is in its power to afford the requisite assistance for the protection of the property and refused or failed to furnish the same': Dobson to Palmerston, London, 26 August 1848, reprinted in Parry, op. cit. above (p. 295 n. 178), vol. 17, at pp. 394, 395-6.

¹⁸⁴ Op. cit. above (p. 295 n. 179), at p. 497. It is interesting to compare the Cazotte claim with a situation which arose in Central America in 1829. Property of Chilean citizens had been seized and sold by the El Salvador Government during a civil war. The Chilean Vice Consul demanded relief from the Vice-President of Salvador 'under the law of nations (the fundamental basis of all government)', but was refused. He then appealed to the Federal Government's Minister of Foreign Relations in Guatemala, who promised him that measures would be taken to recover the property, and when peace was restored 'to assure that the Chilean citizens are indemnified in S. Salvador by

position, and involved the claims of the Spanish Government against the US on behalf of citizens who had lost property in the recent New Orleans riots. The US Government had rejected the claims, asserting that American citizens had also been injured in the rioting and were not entitled to compensation. Spanish subjects who had voluntarily come to the US to carry on their respective businesses on the same basis as nationals therefore could not protest if they were subjected to the same laws and remedies as nationals.¹⁸⁵ 'Without doubt', Bello concluded,

in domestic revolts, as with earthquakes, floods, the harm extends to and weighs upon some persons more directly than others; and in these cases help and aid have been given for humanitarian reasons; but this is . . . not a duty out of which claims can arise. It is an imperfect obligation subject to the discretion of the party which has it and of which he alone may judge how and when to apply it.¹⁸⁶

Bello thus anticipated by more than forty years Carlos Calvo's concern that if Governments assumed complete responsibility for all injuries to aliens during civil wars they would 'create an exorbitant and fatal privilege essentially favourable to powerful states and injurious to weaker nations and establish an unjustifiable inequality between nationals and foreigners'.¹⁸⁷ It was Bello, not the Europeanized diplomat Calvo, who best reflected past Latin-American historical experience and practice, and who should be credited with inspiring the draftsmen of future legislation, constitutions and treaties restricting the rights of aliens to claim pecuniary relief for revolutionary damage on any other basis except that accorded nationals.

Indeed, Colombia as early as 1848 had denied foreigners any right to claim from the 'legitimate government of the Republic' damages resulting

those responsible for the losses they suffered there'. The Chilean Vice Consul expressed his satisfaction at the outcome: *Gaceta del Gobierno de Guatemala*, 15 November 1827, pp. 256-8. The Minister thus enunciated what continued to be the basic Latin-American position on losses suffered during civil disturbances: the employment of Governmental authority to recover the property, if possible, and the apprehension of the culprits so that they, not the Government, could provide compensation.

¹⁸⁵ Bello to Cazotte, op. cit. above (p. 295 n. 179), at pp. 498-9. An American commentator concluded his discussion of the US position on the New Orleans riots by observing somewhat sarcastically that 'on the other hand, the United States has shown commendable zeal in protecting its citizens from such attacks abroad. It has repeatedly interposed diplomatically in China, Turkey, Mexico, Panama, Chile, Brazil and other Central and South American States': Hershey, 'The Calvo and Drago Doctrines', *American Journal of International Law*, 1 (1907), pp. 26, 34.

¹⁸⁶ Bello, op. cit. above (p. 295 n. 179), at p. 504. Hershey, while basically sympathetic to the Latin-American position, states that a State is directly responsible for the acts of its agents unless they are promptly disavowed, their authors punished and reparations made. While a State is indirectly responsible for the orderly conduct of the nation, it is not bound to prevent all acts of violence against aliens, but to furnish the same degree and kind of protection and the same means of redress granted to its own nationals: Hershey, loc. cit. (previous note), at p. 31. Elihu Root, then President of the American Society of International Law, noted that in several incidents where aliens were lynched or maltreated in the US, the Government had paid indemnities 'for the real reason that we had not performed our international duty' of providing aliens 'the same protection we extend over our own citizens': Root, 'The Basis of Protection to Citizens Residing Abroad', *American Journal of International Law*, 4 (1910), pp. 517, 525.

¹⁸⁷ Quoted in Hershey, *ibid.* 1 (1907), at p. 27. Calvo denied absolutely that a government would be responsible for any losses incurred by foreigners in times of domestic unrest or civil wars.

from 'political commotions when said damages . . . have not been caused by legitimate authority, or when a prior or later law does not give that right of action to nationals; excepting always the right to bring an action for all classes of damages against third parties in compliance with ordinary laws and in the cases prescribed by them'.¹⁸⁸ Bello's native Venezuela followed in 1854 with a decree which went even further and forbade any foreigner to bring an action for damages against the legitimate government arising out of political commotions 'or any other reason' not caused by the legitimate government, apparently with no relation to whether or not nationals could do so.¹⁸⁹ An 1873 decree, however, clarified its 1854 predecessor by providing that aliens had no right to claim damages for losses resulting from 'war' except in the same circumstances as Venezuelans.¹⁹⁰

The Guatemalan 1879 Constitution in Article 13 also adhered closely to Bello: 'Neither Guatemalans nor aliens can in any case claim against the Government for the damages and injuries caused to their persons or property by factions'.¹⁹¹ The Honduran Constitution of the following year contained a similar provision.¹⁹² The 1894 Honduran Constitution followed the earlier trend and in Article 14 declared that aliens 'cannot claim nor demand any indemnification from the State except in the cases and in the form that Hondurans might'.¹⁹³

In 1901 Venezuela adopted the first Latin-American constitution of the twentieth century. It reiterated earlier legislative provisions that foreigners who participated in political disputes would be subjected to the same consequences as Venezuelans, and that in no case could either aliens or nationals claim against the State for damage or expropriations 'not carried out by the legitimate authorities, acting in their public capacity'.¹⁹⁴ Constitutional provisions were supplemented in 1903 by a decree which, after stating that aliens in Venezuela would enjoy the same civil rights as nationals, gave aliens the same right as Venezuelans to claim against the State for losses or damage suffered in time of war at the hands of 'legally constituted civil or military authorities acting in their public capacity'.¹⁹⁵ No claims would be allowed by either Venezuelans or aliens for losses suffered in revolutions, although aggrieved parties could bring personal actions against the perpetrators for losses.¹⁹⁶ A claim could not, however, be made except through the procedures established

¹⁸⁸ Ley de 16 Marzo 1848: *Leyes y Decretos de Colombia* (1848), p. 3.

¹⁸⁹ Article 1, Decreto de 6 marzo 1854: *Recopilación de Leyes y Decretos de Venezuela*, vol. 3 (1854), p. 122.

¹⁹⁰ Article 6, Decreto de 14 Febrero 1873: *ibid.*, vol. 5 (1890), p. 284.

¹⁹¹ L. Otero, *Las Constituciones de Guatemala* (1958), pp. 423, 425.

¹⁹² Article 22: *id.*, *Las Constituciones de Honduras* (1962), p. 22.

¹⁹³ A. Moreno (ed.), *Colección de las Instituciones Políticas y Jurídicas de los Pueblos Modernos* (1902), vol. 1, p. 10.

¹⁹⁴ Article 14 (1): L. Otero, *Las Constituciones de Venezuela* (1965), pp. 422, 428.

¹⁹⁵ Article 16, Ley de 16 Abril 1903: *Recopilación de Leyes y Decretos de Venezuela*, vol. 26 (1905), p. 66.

¹⁹⁶ *Ibid.* at Article 17.

by domestic legislation to determine its validity 'as well as its correct value'.¹⁹⁷ Thus claims were to be settled in local tribunals using local valuation procedures without any reference to international law. This Venezuelan determination to adjudicate alien claims only in local courts with exclusive reference to domestic law rather than submit to arbitration helped to precipitate the Anglo-German naval blockade of 1902. Venezuela was forced to capitulate, and the claims were eventually submitted to international arbitration.¹⁹⁸

Bello's 1864 edition also treated for the first time another major source of irritation and claim—the failure of Latin-American governments to service their international loans. The problem arose soon after recognition when all the loans floated in London in 1822–5 went into default. By 1837 Latin-American borrowers—excluding Brazil which had resumed payments—owed foreign creditors £18,542,000 in principal and £8,023,000 in accrued interest.¹⁹⁹ Colombian bondholders as early as 1823 had requested the British Foreign Secretary, George Canning, to intervene forcibly on their behalf, but he had refused. Later Prime Ministers followed his example, reasoning that any losses arose out of purely private financial speculations for which the government was not responsible.²⁰⁰ Bondholders had participated in sub-standard loans abroad in the hopes of obtaining high interest rates, and so had assumed the risk of default.²⁰¹ If bondholders' claims were incorporated into an international agreement, more vigorous government support could be

¹⁹⁷ Ibid. at Article 16.

¹⁹⁸ Hershey, 'The Venezuelan Affair in the Light of International Law', *American Law Register*, 51 (1903), p. 249: 'It will thus be seen that Venezuela, acting in accordance with the Calvo doctrine which she appears to have incorporated in her own constitution and laws, insisted upon an *ex parte* settlement of the claims of the allies by her own authorities': *ibid.* at p. 262. The persistence of Latin-American reluctance to submit pecuniary disputes with aliens to international decision makers is reflected in the 1974 UN Charter of Economic Rights and Duties of States, which was inspired by Mexican President Luis Echeverría and his Ambassador at the UN Jorge Castañeda. Article 2 of the Charter rejects all diplomatic protection, enables a State nationalizing alien property to decide unilaterally upon the compensation it will offer deprived aliens, and provides that any disputes over the amount of compensation can only be settled in the municipal courts of the taking State unless the latter 'has freely agreed otherwise': GA Res. 3281, *General Assembly Official Records*, 29th Session, Supplement 31, p. 50, UN Doc. A/9631 (1974).

¹⁹⁹ 'Statement of the Loans raised in England for the Service of the late Spanish American colonies . . .', in Webster, *op. cit.* above (p. 255 n. 9), vol. 1, Appendix II, at p. 560.

²⁰⁰ D. Platt, *Finances, Trade and Politics in British Foreign Policy, 1815–1914* (1968), at pp. 34–41.

²⁰¹ See, generally, 'Correspondence between Great Britain and Foreign Powers and Communications from British Government to Claimants relative to Loans made to British Subjects, 1823–1847', *Parliamentary Papers*, 1897, vol. 69. In regard to the Mexican loans, J. Backhouse wrote on behalf of Foreign Secretary Lord Aberdeen to the bondholders' representative that 'the grievances of which you complain arise out of speculation of a purely private nature for the success of which His Majesty's Government are in no way responsible and upon which they do not, as a matter of right, claim to exercise any authoritative interference with foreign States'. Nevertheless, the Government were ready 'so far as they can properly interfere, to second, by their countenance and good offices, on any favourable opportunity, any representation which bondholders may address to their Governments to obtain the early and complete satisfaction of their claims': Backhouse to Ewing, London, 8 April 1829, *ibid.*, at p. 523.

expected, as where British subjects in Latin America or their property were directly injured. In such instances armed intervention might be justified under existing concepts of international law, as in the case of Mexico.²⁰² Normally, however, the most bondholders could expect was the employment by the Foreign Office of its unofficial 'good offices' to persuade defaulting governments to honour their obligations.

Nor could bondholders find relief in court. Even where the loan agreement was governed by English municipal law, a State could still raise a sovereign immunity defence.²⁰³ In the absence of overt, forceful government support and the protection of the courts, bondholders then formed committees on a country-by-country basis to obtain relief by pressuring the defaulting States through publicity, delisting their bonds on stock exchanges, and lobbying Parliament. In 1868 the various committees were united into a single body which in 1873 was incorporated as the Corporation of Foreign Bondholders. Throughout the nineteenth century the Corporation negotiated with the Latin-American debtors, arranging reschedulings, consolidations and restructurings which often seemed merely to provide opportunities for further moratoria and default.²⁰⁴

In London Bello had witnessed at first hand the collapse of Latin America's credit-standing as the various States failed to service the loans contracted during the 1822-5 lending boom. He became directly involved when as a Colombian diplomat in 1826 he was charged by Vice-President Santander with a desperate and futile attempt to rescue the nation's sagging finances by organizing an additional loan with which to help repay the two prior borrowings of 1822 and 1824 totalling £6,750,000 and which were now in default.²⁰⁵ More recently Mexican President

²⁰² Platt, *op. cit.* above (p. 299 n. 200), at pp. 52, 316-18. Frustrated bondholders even contemplated using force themselves to secure payment. When in 1836 customs duties pledged to service the Mexican international debt were misappropriated, the bondholders wrote to Lord Palmerston requesting his sanction to fit out 'armed vessels to make reprisals on the Mexican government to the amount of the property which is stated to have been thus unlawfully seized . . .'. J. Backhouse answered on behalf of Palmerston rejecting the plan but assuring the bondholders that the English Chargé in Mexico would exercise his influence 'in an unofficial manner, to point out to the Government of that country the hardship and injustice and impolicy of the course they have pursued': Backhouse to Warrington, London, 24 February 1836, in 'Correspondence . . .', *loc. cit.* (previous note), at p. 529.

²⁰³ 'The States cannot be sued as defendants. Against any such attempts they are allowed by the courts to plead their quality as sovereigns . . . As matters stand, a State as a creditor can sue as a plaintiff in Europe or in the United States, but no citizen being a creditor can sue it as a defendant': Clarke, 'On the Debts of Sovereign and Quasi-Sovereign States, owing by Foreign Countries', *Journal of the Statistical Society*, 41 (1878), pp. 299, 335. A defaulting sovereign borrower's immunity from suit has now been greatly restricted by legislation in the UK (the State Immunity Act 1978, reprinted in *International Legal Materials*, 17 (1978), p. 1123) and in the US (the Foreign Sovereign Immunities Act 1976, 28 USC sections 1330, 1391, 1602-11 (1976)).

²⁰⁴ *Sixty-first Report of the Council of the Corporation of Foreign Bondholders for the Year 1934*, at pp. v-vii. The chequered payment histories of Latin-American loans are summarized in the 1934 Report at pp. 89-92 (Argentina), pp. 146-54 (Colombia), pp. 293-302 (Mexico), pp. 262-86 (Guatemala), pp. 274-8 (Honduras) and pp. 489-91 (Venezuela).

²⁰⁵ After discreet inquiries in financial circles, Bello and his colleague Santos Michelena wrote to the Colombian Secretary of the Treasury that 'the general opinion is that unless a considerable

Benito Juárez's declaration of a debt moratorium had been the immediate cause for the decision of Great Britain, France and Spain in 1861 to dispatch armed forces to seize the Vera Cruz customs house. Consequently, consistently with his warning occasioned by the 1835 French blockade of Buenos Aires that Latin-American nations should not unnecessarily provide stronger powers with pretexts for intervention, Bello in the 1864 *Principios* insisted that States should scrupulously honour their financial obligations to foreign creditors in order to forestall claims for breach of contract. It was irrelevant whether the money lent had been invested wisely or dissipated:

Loans contracted for the service of a State and the debts created in carrying on public business . . . , are binding on the entire nation. Nothing can excuse it from paying these debts.²⁰⁶

Bello then summarized Lord Palmerston's January 1848 Circular in which the Foreign Secretary had informed British representatives abroad that it was within the British Government's discretion whether or not to intervene diplomatically on behalf of British subjects who had lost money in loans to foreign governments.²⁰⁷ There could not, however, 'be any doubt whatever of the perfect right which the Government of every country possesses to take up as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the government of another country . . .'. Exercise of this discretion, however, 'turns entirely upon British domestic considerations'. The British Government up to 1848 had sought to discourage subjects from investing abroad in 'hazardous loans to foreign governments' capital which could be better employed at home. Therefore the Government had 'thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements with respect to such

remittance of funds is made from the Colombian treasury, it will be impossible to dissipate the ugly impressions created among the public by the state of payment of our dividends which unfortunately coincided with [the non-payment] of those of Peru and Chile . . .': Bello and Michelena to Secretary of Treasury, London, 15 November 1826, in Bello, *Derecho Internacional*, vol. 2, *Obras Completas de Andrés Bello*, vol. 11 (1981), at pp. 112, 114. The following month the Secretary was told that a new loan, 'rather than re-establish the credit of Colombia, would destroy it completely' and 'that it is not possible to inspire the public with confidence without remitting funds from Colombia': Bello and Michelena to Secretary of Treasury, London, 7 December 1826, *ibid.* at p. 116. In all of the Latin-American loans the first three or four semi-annual interest payments had been made from funds withheld in advance by the London agent banks from the proceeds of the bond issues. In effect this meant that bondholders were being paid out of their own money. When the retained proceeds were exhausted, the loans went into default since none of the Latin-American borrowers could afford to make the remittances necessary to service their obligations. After deductions of large amounts for commissions, interest in advance, discounts, expenses and amortization funds, the borrowing nations on average received but 60 per cent of the face value of the bonds they had issued: Rippy, *op. cit.* above (p. 285 n. 116), at pp. 21-2.

²⁰⁶ Bello, *op. cit.* above (p. 260 n. 23), at p. 47.

²⁰⁷ *Ibid.* at pp. 47-8. The Circular is reprinted in full in Platt, *op. cit.* above (p. 299 n. 200), Appendix II.

pecuniary transactions'. This policy might change, Palmerston warned, if the losses on foreign loans became 'so great that it would be too high a price for the nation to pay for such a warning as to the future . . .'.²⁰⁸

Bello concluded, citing de Martens and Phillimore, that the most a foreign creditor could expect was to be placed on the same footing as domestic creditors. If, however, the State clearly sought to defraud its creditors by debasing its currency or repudiating its public debts, the creditor's nation might adopt 'other means and even war itself'.²⁰⁹ Nevertheless, Bello opined, it would not be just to deprive a State in cases of 'extraordinary necessity [of] the power to adopt temporary measures respecting its paper money', provided that 'its promised real value is paid and in the interval the foreign creditor is treated on the same basis as the domestic creditor'.²¹⁰

Bello further wrote that even where a State is divided into two or more nations, its financial obligations survive and must either be met or divided by agreement among the successor States. Although he cites Rutherford and Wheaton for the general principle that a State's obligations and rights survive its dismemberment and must be allocated among the successor States,²¹¹ Bello could as well have referred to contemporary Latin-American State practice. In 1830 Colombia, which owed over £6,650,000 in unpaid principal plus accrued interest to its English creditors, disintegrated into its component States of New Granada, Venezuela and Ecuador. By 1837 the successor States had agreed to share the total debt among themselves. New Granada assumed 50 per cent or £4,903,205, Venezuela became liable for 28.5 per cent or £2,794,826, while Ecuador was assigned 21.5 per cent or £2,108,377.²¹² In 1838 at the urging of British Consul Frederic Chatfield, the successor States to the United Provinces of Central America divided the external federal debt of £163,100 between Guatemala (£67,900), Nicaragua (£27,200), Honduras (£27,200), Costa Rica (£13,600) and El Salvador (£27,200).²¹³

²⁰⁸ Although the 'discretion' of which Palmerston wrote was never exercised on behalf of bondholders, the threat was ever-present. Thus in 1836 the British Consul General in Valparaíso, John Walpole, informed Chilean President Diego Portales 'that there is a strong feeling of indignation possessing itself of the public mind in Great Britain, at the manner in which the American States continue to withhold payment of interest on their loans, which may at no distant period compel the British Government more strictly to espouse the cause of the bondholders, unless, in the meanwhile, the American Governments shall, of their own accord, do justice to their British creditors': Walpole to Portales, Valparaíso, 13 December 1836, in 'Correspondence . . .', loc. cit. above (p. 299 n. 201), at p. 260. Bello, who was then active in the Foreign Ministry, surely knew of the correspondence.

²⁰⁹ Bello, op. cit. above (p. 260 n. 23), at p. 48; Phillimore, op. cit. above (p. 275 n. 77), vol. 2, at p. 14.

²¹⁰ Bello, op. cit. above (p. 260 n. 23), at pp. 48-9.

²¹¹ Ibid. at p. 49.

²¹² Decreto de 20 de Abril Aprobando la Convención Concluida con el Gobierno de la Nueva Granada sobre arreglo y división de la Deuda de Colombia: *Cuerpo de Leyes de Venezuela*, vol. 1 (1951), p. 178; E. Eastwick, *Venezuela, or Sketches of Life in a South American Republic, with the History of the Loan of 1864* (1865), at p. 323; D. P. O'Connell, *State Succession in Municipal Law and International Law* (1967), vol. 1, pp. 388-9 n. 6.

²¹³ Accrued interest was divided in the same proportions: M. Rodríguez, *A Palmerstonian Diplomat*

Reallocation of the debt and recognition of indebtedness did not amount to payment, however, and a protracted series of reschedulings, moratoria, defaults and more reschedulings exacerbated relations between Latin America and its creditors throughout the remainder of the century.²¹⁴

Fortunately for the Latin Americans, despite Palmerston's warnings and Bello's fears after the Mexican affair, policy reasons continued to deter protecting States from intervening forcibly or officially on behalf of creditors, although informal 'good offices' were frequently employed, and British consuls became involved by creditors as collection agents. Even in the last major nineteenth century intervention in South America—the Venezuelan naval blockade—bondholder claims were ancillary to more serious assertions of direct injury to alien persons and property.²¹⁵

Bello would surely have welcomed Argentine Foreign Minister Luis Drago's declaration, motivated by the Venezuelan intervention, that States had no right to use force to collect defaulted public debts.²¹⁶ In any case Bello disapproved of armed intervention, believing that mediation and conciliation were the only acceptable methods by which a State could interfere in another State's affairs. He still, however, would have insisted that debtor States were obliged to pay their debts even if contracted under prior regimes. Thus, unlike his position on non-intervention, Bello's attitude towards foreign loans was probably not in harmony with that of some nineteenth century Latin-American leaders such as Venezuelan President Cipriano Castro who were convinced that their States' foreign debts were unjustifiable burdens upon national economies.

in Central America: Frederick Chatfield, Esq. (1964), pp. 114–20; Sixty-first Report of the Council of the Corporation of Foreign Bondholders for the Year 1934, at pp. 167, 262, 274, 312, 407.

²¹⁴ New Granada (now Colombia) remained in arrears on her share until 1841, defaulted on at least five subsequent reschedulings, and 'the debts assumed in 1834 were not fully paid off until after 1920'. The Venezuelan and Ecuadorian loans had similar histories, as did the debts assumed by the Central American republics: E. Feilchenfeld, *Public Debts and State Succession* (1931), p. 297, n. 120. The disastrous history of the Venezuelan foreign debt up to 1864 is described in Eastwick, *op. cit.* above (p. 302 n. 212), at pp. 321–8. Referring to official refusal to intervene on behalf of bondholders, the author observed '... that the English Government gratuitously parades its determination not to enforce the claims of its subjects. Now, whatever the intention of a claimant may be, it is surely very unwise to proclaim beforehand that resort will not be had to ulterior measures. It is like putting up a board to warn trespassers that they will *not* be prosecuted': *ibid.* at p. 328 (emphasis in original).

²¹⁵ In fact, the bondholders only requested British Government assistance after the decision to intervene had already been taken. See discussion on the relationship between the Venezuelan bondholders and the British Government in Platt, *op. cit.* above (p. 299 n. 200), at pp. 339–47; see also Hershey, *loc. cit.* above (p. 299 n. 198), at pp. 256–8.

²¹⁶ For a discussion of the Drago Doctrine, which originated in a letter to the Argentine Foreign Minister in Washington, see Hershey, 'The Calvo and Drago Doctrines', *American Journal of International Law*, 1 (1907), p. 26. Drago had written: 'The collection of debts by military force supposes territorial occupation to make it effective, and territorial occupation means the suppression or subordination of the local governments in the countries to which it is extended': Drago to Merou, Buenos Aires, 29 December 1902, reprinted in L. Drago, *La República Argentina y el Caso de Venezuela* (1903), pp. 1, 5.

(d) *Diplomatic Protection and the Exhaustion of Local Remedies*

The *Principios* states that municipal courts are the proper venue in which aliens should litigate their complaints. According to Bello, only if a court refused to hear the case or committed an 'obvious injustice' (*injusticia manifiesta*) could the alien invoke the authority of his sovereign by 'appealing to the Minister of his State accredited to the government in the territory of which he resides, or in the absence of a minister, to his consul so that he can request that his case be heard or so that he might be indemnified for damages'. In the absence of both the minister and the consul, the aggrieved party could appeal directly to his government 'so that it might take the measures required by the case'.²¹⁷

Bello explains his insistence upon the exhaustion of local remedies before allowing the interposition of the alien's own State²¹⁸ by asserting that a State's jurisdictional acts over aliens residing in it, 'if they are in accord with their own laws', must be respected by other States 'because on setting foot in the territory of a foreign State, we contract . . . the obligation to submit to its laws, and therefore the rules established for the administration of justice'.²¹⁹ Vattel, upon whom Bello relied, had written in a similar vein that

The public safety, the rights of the nation and of the prince, necessarily require this condition, and the foreigner tacitly submits to it [local law], as soon as he enters the country . . . In virtue of this submission, foreigners who commit faults are to be punished according to the laws of the country [and disputes] are to be determined by the judge of the place, and according to the law of the place.²²⁰

The alien's prince, Vattel wrote, should refrain from interfering in these disputes,

excepting where justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or, finally, an odious distinction made to the prejudice of his subject or foreigners in general.²²¹

²¹⁷ A. B., op. cit. above (p. 293 n. 169), at p. 54. Bello in his 1844 edition, however, dropped the references to an alien's right to appeal to his minister or consul and states simply that if a court refused to hear an alien's case or committed an 'obvious injustice', the alien 'could then invoke the authority of his own sovereign so that he can request that his case be heard or so that he might be indemnified for damages': *Principios de Derecho Internacional* (Caracas edn., 1847), p. 77. The 1864 edition retained the language of the 1844 edition: Bello, op. cit. above (p. 260 n. 23), at p. 122.

²¹⁸ The exhaustion of local remedies rule developed from 'the reciprocal desire of States to avoid where possible situations which would justify interference by other States in their internal affairs, combined with the general proposition that aliens entering foreign countries may be presumed to have submitted themselves voluntarily to the jurisdiction of local courts': F. Dawson and I. Head, *International Law, National Tribunals and the Rights of Aliens* (1971), pp. 18-19.

²¹⁹ A. B., op. cit. above (p. 293 n. 169), at pp. 54-5; Bello, op. cit. above (p. 260 n. 23), at p. 124. A modern commentator has written: 'If a State in which an alien is injured puts at his disposal apparently effective and sufficient legal remedies for obtaining redress, international law requires that he should have had recourse to and exhausted these remedies before his own State becomes entitled to intervene on his behalf': J. Brierly, *The Law of Nations* (6th edn., by Waldock, 1963), at p. 281.

²²⁰ Vattel, op. cit. above (p. 270 n. 56) (4th edn., 1811), p. 172.

²²¹ Ibid. at p. 166. An early twentieth-century scholar commented that when 'the courts are notoriously under the control of an unprincipled dictator, so that an appeal to them would be a

Although Bello apparently wished to restrict the right of protecting States to intervene in litigation involving their nationals, he did not advocate abolition of diplomatic protection entirely, and clearly believed that at some stage an alien had the right to seek the diplomatic protection of his government or its representative. Thus, when discussing the duties of consuls, he states in the *Principios* that 'the consul should protect his fellow citizens from all injury [*insulto*], appealing, if necessary, to the [national] supreme government'.²²² Bello was in fact relying upon the State practice he had witnessed in Europe, and as evidenced in consular conventions between the Latin-American nations themselves. During the 1820s when Bello had lived in London, the British Government protested at the seizure of English property and the imposition of forced loans and contributions upon English merchants in Spain. Similar protests by consular authorities were lodged when British subjects were harassed by customs officials at Calais and Boulogne, subjected to personal searches, imprisoned and denied access to their consuls. The more outrageous incidents and the British Government's reaction to them were widely reported in the English press, where Bello surely saw them.²²³

In Latin America diplomatic protection was assured by treaty as early as 1853 when Chile and New Granada authorized their consuls

to complain of any infraction of existing treaties, or of any abuse which may be committed by the authorities or officials of the country, to the prejudice of individuals of the nations which the consul represents. They may also support their fellow countrymen before the tribunals or authorities of the country, in actions brought for the improper conduct of any functionary.²²⁴

The 1855 and 1857 Consular Conventions between Chile and Ecuador²²⁵ and between Chile and Costa Rica²²⁶ contained similar language, while

mockery and a sham, it would indeed be a perversion of justice for an alien to be confined to his remedy in them even though the citizen of the country should have no other': Boardwell, 'Calvo and the "Calvo Doctrine"', *Green Bag*, 18 (1906), pp. 377, 380.

²²² Bello, op. cit. above (p. 260 n. 23), at p. 150.

²²³ For example, in October 1822 Mr John Bowring was arrested at Calais when French customs officials discovered and seized sealed letters from the Portuguese Ambassador in Paris in his baggage, it being against French Post Office regulations to carry sealed letters out of the country. He was accused of smuggling correspondence to revolutionaries in England, taken to Boulogne, imprisoned and denied access to the British consul. Bowring managed to write to his friend Jeremy Bentham, who in turn wrote to Canning urging his intervention. Canning then wrote to the British Ambassador, Sir Charles Stuart, who eventually obtained Bowring's release. The affair received extensive press coverage. *The Sunday Times*'s reaction was typical: 'The release of this gentleman, although it has rendered one sort of interference unnecessary, has left the question of redress still open and we trust, in justice to all British subjects, whose rights have been violated in this case, that prompt measures will be taken to obtain suitable redress': *The Sunday Times* (London), 24 November 1822, at p. 2, col. a. See also *The Star* (London), 15 October 1822, at p. 2, cols. a-b: 'The arrest and committal of a British subject, and the refusal to the British consul to communicate with him are outrages which, we presume, it will be found very difficult for the French Government to justify.' Bowring's own letters to Stuart and to Canning requesting their intercession were reprinted in full in *The Examiner* (London), 20 October 1822, at p. 659, col. a, and 27 October 1822, at p. 693, col. a.

²²⁴ Consular Convention, Article IX, *Consolidated TS*, vol. 111, pp. 31, 34.

²²⁵ Article 9: *ibid.*, vol. 113, at pp. 169, 173-4.

²²⁶ Article 10: *ibid.*, vol. 117, at pp. 63, 67.

in 1858 the Treaty of Amity, Commerce and Navigation between New Granada and Peru assured consuls the right to appeal to local authorities 'in order to complain against any violation of existing treaties or abuses committed by the employees and authorities of the country to the detriment of individuals or the nation the Consul serves'.²²⁷ Two years later Peru and Ecuador agreed that their consuls ordinarily would not 'support the private affairs' of their subjects 'unless it is required by international law, by the special nature of them, or when it is shown that the justice solicited has been improperly delayed or denied . . .'.²²⁸ In 1864, the year Bello published the last edition of the *Principios*, Bolivia and Peru in their Treaty of Commerce and Customs empowered their respective consuls to ' . . . defend the rights and interests of their compatriots and support their well-founded claims and complaints'. In the event of a consequent denial of justice, however, 'they are restricted to informing their respective governments'.²²⁹

Therefore while post-Bello Latin-American commentators such as Carlos Calvo and Rafael Seijas²³⁰ might legitimately object to the misuse of diplomatic protection as a technique for obtaining redress for legitimate claims, both its European and Latin-American antecedents were clearly impeccable.²³¹ Moreover, as one commentator has suggested, in the absence of a global juridical system the device of diplomatic intervention probably saved the Latin-American States from the abrupt

²²⁷ Article 29 (1): *ibid.*, vol. 118, at pp. 363, 372.

²²⁸ Treaty of Peace, Friendship and Alliance, Article XXII: *ibid.*, vol. 121, at pp. 309, 314.

²²⁹ Article 10 (6): *ibid.*, vol. 129, at pp. 383, 387.

²³⁰ Seijas, like Calvo, wrote that alien claims for pecuniary redress had been the principal cause of interventions in Latin America, were frequently exaggerated, and were made 'for the benefit of those subjects or aliens to whom protection has been improperly extended. . . . But it is certain that in international law [such claims] cannot be considered a legitimate reason for intervention and neither has it been so considered in the reciprocal relations among European powers. Why then is it applied by them in their relations with the American States?': R. Seijas, *El Derecho Hispano Americano (Público y Privado)* (1884), vol. 1, p. 48. Nearly one hundred years later Judge Padilla Nervo echoed Seijas when he wrote: 'The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded': separate opinion of Judge Padilla Nervo, *Barcelona Traction case*, *ICJ Reports*, 1970, pp. 244, 246.

²³¹ The employment of diplomatic interposition in Europe in the 1820s and its recognition in treaties between the Latin-American States themselves suggest that despite undoubted abuses some Third World commentators are incorrect when they assert that the doctrine of State responsibility was based solely upon 'the unequal relations between great powers and small states of the Nineteenth Century, and the inequality of strength was translated into an inequality of rights': S. Sinha, *New Nations and the Law of Nations* (1967), pp. 92-4. Similarly it may be an over-simplification to assume that the rules of international law, particularly those governing diplomatic intervention, 'were usually constructed to satisfy the interests of the capital exporting nations': Falk, 'Historical Tendencies, Modernizing and Revolutionary Nations, and the International Order', *Howard Law Journal*, 8 (1962), pp. 128, 133. The Mexican Ambassador to the UN, Jorge Castañeda, overstated his case when he asserted that 'the doctrine of responsibility of States was merely the legal garb that served to cloak and protect the imperialistic interests of the international oligarchy during the nineteenth century and the first part of the twentieth': 'The Underdeveloped Nations and the Development of International Law', *International Organization*, 15 (1961), pp. 38, 39.

recourse to armed force and territorial conquest employed in Asia and Africa.²³² To reject, as did Calvo, diplomatic protection without providing a viable alternative means of settling disputes before they escalated into armed violence therefore was unacceptable to the majority of European and American statesmen as well as to many Latin Americans.²³³

Bello does not define the 'obvious injustice' which, according to the *Principios*, an alien must suffer in order to entitle him to appeal to his own State for assistance. The text of the 1864 edition, however, suggests that it was equated with a 'denial of justice', which he in turn defines only by stating that it cannot exist if reparation has not been pursued through all the regular means offered by the judicial administration of the nation in which the injury has occurred. Citing Phillimore, he summarizes 'as an example of the application of this rule' the celebrated *Don Pacifico* case wherein the British administration was criticized abroad and in Parliament for its resort to armed intervention before the injured British subject had begun an action in the Greek courts.²³⁴ Unlike Calvo, however, he would in certain limited circumstances allow diplomatic intervention.

Again, Bello was expressing before Calvo the prevailing Latin-American view that local courts were the proper places for aliens to seek redress. Calvo's lack of originality is also shown by Article 38 of the 1857 Mexican Constitution which declared that while foreigners in Mexico would enjoy the same civil rights as Mexicans, aliens 'are obliged to . . . respect the institutions, laws and authorities of the country, subjecting themselves to the judgements and decisions of the courts, without the power to invoke additional remedies other than those available to Mexicans'.²³⁵ The article apparently excludes any type of diplomatic intervention, and delegates to the 1856 Constitutional Convention had rejected a proposed additional clause which would have provided that aliens 'may never bring a claim against the nation except when the Government or another federal authority prevents them from asserting their rights in legal form [denial of access to courts] or prevents the execution of a judgement rendered according to the laws of the country'.²³⁶ The debates demonstrated that some delegates believed strongly

²³² F. Dunn, *The Protection of Nationals* (1932), p. 57.

²³³ 'The doctrine of Calvo does not, however, seem to have found any support outside Latin America. Its acceptance might leave foreigners in certain localities without any protection whatever against injustice or oppression. On the other hand, it must be admitted that diplomacy seems to give the advantage to stronger against weaker States. Differences of this nature should always be settled by mixed commissions or courts of arbitration. In order to make the necessary arrangements for these, resort to diplomacy is, however, absolutely necessary': Hershey, loc. cit. above (p. 299 n. 198), at pp. 259-60 n. 20. Also, 'abolishing diplomatic intervention to cure its abuses would leave the citizen abroad totally at the mercy of native justice, and the possible abuses inherent in such a situation would be considerably greater than those that exist now': Shea, op. cit. above (p. 296 n. 182), at p. 20.

²³⁴ Bello, op. cit. above (p. 260 n. 23), at pp. 122-4.

²³⁵ J. Gamboa, *Las Constituciones Mexicanas durante el Siglo XIX* (1901), at p. 528.

²³⁶ F. Zarco, *Crónica del Congreso Constituyente* (1957), p. 548. Delegates had said that a denial of justice included denial of access to courts, refusals to enforce judgments and judgments which were

that while unfounded claims had indeed depleted the treasury 'to enrich a number of daring adventurers and insolent smugglers', international law, not constitutional law, should determine whether or not claims against the State should be heard. The matter was best left to treaties, they concluded, since a constitution was an inappropriate document in which to define denials of justice.²³⁷

Subsequent Latin-American constitutions and legislation in the main attempted, as did Bello, to reconcile the need to protect the integrity of the domestic judicial process with recognition in certain cases of an alien's rights to seek the assistance of his Government when local judicial relief was not available or was inadequate. Draftsmen of the 1879 Guatemalan Constitution therefore produced a more balanced document than the Mexicans, perhaps because their experience with foreign claimants had been less frequent and onerous. After stating, like Bello, that 'from the instant . . .' an alien entered the country he was obliged to respect the local authorities and obey the laws, the document provided that all the 'inhabitants' of the country had unimpeded access to the courts to present their grievances. 'Foreigners', however, 'cannot have recourse to diplomatic appeals except in cases of denial of justice. For this purpose, a decision against the claimant will not be considered a denial of justice.'²³⁸ Although phrased negatively, this was apparently the first Latin-American constitutional attempt to define denial of justice.

Other Latin-American nations followed the Guatemalan example. Venezuela's 1881 Constitution declared that while foreigners would enjoy the same civil rights as Venezuelans, and the same security in their persons and property as nationals, 'they could only seek diplomatic redress according to public treaties and in the cases permitted by law'.²³⁹

'unjust and contrary to law': *ibid.* at p. 546. Wheaton's *Elements* had been translated into Spanish and published in Mexico two years prior to the Convention, and so was available to the delegates. Although he was slightly less adamant than Bello concerning non-intervention, the Mexican publishers stated that for the study of international law, 'nothing could be more useful than the work of Wheaton': *Elementos de Derecho Internacional* (trans. J. Barros, 1854), p. ii.

²³⁷ Zarco, *op. cit.* (previous note), at pp. 545-6. Within six years the 1857 Constitution had been replaced by Maximilian's 'Estatuto Provisional del Imperio Mexicano'. The Estatuto offered 'inhabitants' of Mexico equality before the law, security of persons and property, freedom of religion and freedom of expression. It did not reproduce Article 38 or in any other way restrict the activities of aliens. The 1857 Constitution was restored by Juarez in 1867 and remained in force until 1917: Gamboa, *op. cit.* above (p. 307 n. 235), at pp. 510-28.

²³⁸ Articles 13, 23: L. Otero, *Las Constituciones de Guatemala* (1958), pp. 423, 425, 426. In Bolivia the 1880 Constitution in Article 18 made no attempt to define 'denial of justice' but stated simply that 'Foreign subjects or enterprises are, in respect to property, in the same condition as Bolivians, without any case being able to claim a special status nor appeal to diplomatic protection, except in cases of denial of justice': C. Trigo, *Las Constituciones de Bolivia* (1958), p. 424.

²³⁹ Article 10: *id.*, *Las Constituciones de Venezuela* (1965), pp. 347, 349. The Constitution, however, also provided in Article 117 that international law was part of 'Legislación nacional', and that 'its provisions will rule, especially in cases of civil war': *ibid.* at p. 367. Perhaps, therefore, diplomatic protection could be sought where permitted under international, as well as domestic, law. The 1863 New Granada Constitution contained a similar provision, Article 91: L. Pombo and J. Guerra, *Constituciones de Colombia* (1951), pp. 125, 156.

The 1893 Venezuelan Constitution was more explicit, and stated that 'the Nation neither has nor recognizes any other obligations or responsibilities in favour of aliens than those which are established for the benefit of nationals by the Constitution and laws'.²⁴⁰ In 1894 the new Honduran Constitution provided in Article 15 that aliens could not claim diplomatic protection except in cases of denial of justice, and in language similar to earlier Constitutions stated that an adverse decision would not constitute such a denial. As a new contribution to traditional drafting, the same clause added that 'if this provision is violated, and the claims are not peacefully settled and the country is injured thereby [the alien] will lose the right to live in it'.²⁴¹

In the 1870s some Latin-American nations began supplementing constitutional regulation of aliens with special statutes designed to channel aliens into domestic court systems. The 1873 Venezuelan Decree on the Rights and Duties of Aliens provided in Article 5 that neither domiciled nor transient aliens could seek diplomatic protection except when after exhausting local remedies 'it clearly appears that there has been a denial of justice or a flagrant injustice' (*injusticia notoria*).²⁴² In 1903 the decree was amended by adding the phrase 'or an obvious violation of the principles of international law'.²⁴³

Colombia's 1888 Law No. 145 Governing Aliens and Naturalization provided in Article 14 that because the Republic's authorities were obliged to protect and defend all persons resident in Colombia,

the property, rights and actions of foreigners will be protected by the same judges, courts or administrative authorities which protect those of nationals. Exceptions will be made for those cases in which, according to treaties or recognized principles, aliens may enjoy special privileges.²⁴⁴

Any ambiguity as to an alien's right to invoke diplomatic protection for contractual claims was eliminated by Article 15 which, one of the first of its kind to appear in Latin America, subjected all contracts between aliens and the government to Colombian law. Moreover 'the rights and duties arising out of those contracts will be determined exclusively by local judges and courts', and in all contracts with the government, the alien was specifically required to renounce any intention to seek diplomatic interposition 'except in the case of a denial of justice'. Like Bello and

²⁴⁰ Article 10: Otero, op. cit. above (p. 308 n. 238), at pp. 395, 396.

²⁴¹ A. Moreno, *Colección de las Instituciones Políticas y Jurídicas de los Pueblos Modernos* (1902), vol. 1, pp. 8, 10. The 1893 Nicaraguan Constitution, after stating that aliens could not make claims against or demand indemnities from the State except where nationals could, provided in Article 14 that 'Aliens cannot invoke diplomatic protection except in cases of denial of justice. A decision unfavourable to the claimant will not be regarded as such. If in violation of this condition the claims are not settled amicably and through them the country is gravely prejudiced [the alien] will lose the right to live in the country': E. Lejarza, *Las Constituciones de Nicaragua* (1958), p. 583.

²⁴² Article 5: *Recopilación de Leyes y Decretos de Venezuela*, vol. 5 (1890), pp. 283, 284.

²⁴³ Article 11: *Ibid.*, vol. 26 (1905), pp. 66, 67.

²⁴⁴ I. Duque, *Leyes Vigentes y Recopilación de las Leyes Más Importantes de Carácter General Expedidas por el Congreso de Colombia hasta 1928* (1928), at pp. 363, 365.

his 'obvious injustice', the Colombian legislators did not define a denial of justice. Nevertheless, since aliens could invoke diplomatic protection if allowed by treaty or 'recognized principles' (such as those of international law) or in the event of a 'denial of justice', the legislation reflected the law of State responsibility as interpreted by Bello, rather than departing therefrom.²⁴⁵

Late nineteenth-century treaties between the Latin-American nations themselves, or with other nations, further demonstrate the predominance of Bello's influence among Latin-American statesmen over more extreme elements who would deny diplomatic intervention under any circumstances. Thus the 1878 Treaty of Friendship, Commerce and Navigation between Honduras and Nicaragua recognized that while 'Diplomatic Agents . . . shall uphold the rights of their countrymen', they could only do so in cases where their compatriots 'have been denied justice by the judicial or administrative authorities of the respective country'.²⁴⁶ The 1888 Treaty of Friendship, Commerce and Navigation between Ecuador and Mexico was more precise, and provided that if a citizen of either party took part in the civil wars of the other, he would be tried by the same proceedings as natives 'without his being able to claim diplomatic intervention . . . except in cases of denial of justice, manifest contravention of the law in the proceedings, or notorious injustice . . .'.²⁴⁷

Two years later in 1890 Ecuador and El Salvador also provided for diplomatic interposition in private claims where there had been 'a denial of justice, or in the case of a final judgment not being carried out', or where after exhaustion of local remedies there had been 'a clear violation of the present Treaty or of the rules of international law . . . recognized generally by civilized nations'.²⁴⁸ The same year the Dominican Republic and Mexico signed a treaty containing a similar clause.²⁴⁹

Treaties with European nations also contained provisions permitting diplomatic interposition in certain circumstances. For example in the 1892 Treaty of Friendship, Commerce and Navigation, Colombia and Germany agreed that 'Diplomatic agents' would not interfere with private suits 'except in the case of the denial or extraordinary or illegal delay of justice, the non-execution of a legally valid judgment, or, all legal remedies having been exhausted, . . . a clear violation of the existing Treaties between the two Contracting Parties, or of the

²⁴⁵ Among the nineteenth-century constitutions examined, only Ecuador appears to have denied unconditionally any appeal to diplomatic intervention, but then only for contractual claims. The Constitution of 1897 in Article 38 provided that 'all contracts between an alien and the Government, or with a private party, implicitly include the renunciation of all diplomatic claims': R. Borja y Borja, *Derecho Constitucional Ecuatoriano* (1950), vol. 3, p. 433.

²⁴⁶ Article 12: *Consolidated TS*, vol. 152, at pp. 415, 418.

²⁴⁷ Article VI: *ibid.*, vol. 171, at pp. 117, 126.

²⁴⁸ Treaty of Friendship, Commerce and Navigation between Ecuador and Salvador, Article 9, *ibid.*, vol. 173, at pp. 145, 147-8.

²⁴⁹ Treaty of Friendship, Commerce and Navigation, Article XI, *ibid.*, vol. 173, at pp. 151, 169-70.

rules of public or private international law as recognized by civilized nations'.²⁵⁰

Treaties of this type also generally pledged the 'complete and constant' or 'complete and continual' protection of alien persons and property, and contained so-called non-responsibility clauses, whereby the contracting parties agreed that their respective States would not be liable for damages suffered by aliens or their property during insurrections or revolutions provided that the injury was not attributable either to the government's agents, fault or negligence. These clauses, except where they sought to absolve a State without reference to its own contributions to the injury, also reflect Bello's teachings.²⁵¹

Just as scholars have given undue credit to Carlos Calvo for formulating the Latin-American doctrine of non-intervention, so they have over-estimated his influence on the constitutional and legislative attempts in the later nineteenth century to limit recourse to diplomatic protection and to compel aliens to litigate their grievances in local courts. The works of Andrés Bello and the trauma of repeated armed interventions culminating in the French occupation of Mexico had a much earlier and more profound impact upon Latin-American legislators and statesmen.²⁵²

VIII. CONCLUSION

Andrés Bello wrote the first edition of the *Principios* at the moment when the Latin-American republics were seeking simultaneously to consolidate their independence and to evolve legal and political institutions which would protect, guide and facilitate their future development. His works contributed greatly to the process because they reconsidered the traditional international behavioural rules of the classical and recent European past, and sought to adapt them to the needs of preserving Latin America's new freedom and institutions.²⁵³

²⁵⁰ Article XX: *ibid.*, vol. 177, at pp. 263, 269. Article XXI in the 1892 Treaty of Friendship, Commerce and Navigation between Colombia and Italy was identical: *ibid.*, vol. 177, at pp. 493, 499-500.

²⁵¹ Non-responsibility clauses were included in at least thirty treaties to which the Latin-American Governments were parties between 1882 and 1900. See discussion in Arias, 'The Non-Liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection or a Civil War', *American Journal of International Law*, 7 (1913), pp. 724, 753-8.

²⁵² It is significant that the constitutions, treaties and municipal legislation discussed herein and influenced by Bello are virtually all declarative of international law, and not attempts to change it. Rather, the purpose of the legislation was to define precisely the circumstances in which international responsibility would attach in order to prevent its abuse. Bello in the *Principios* warned that municipal legislation could not change international law because 'the rules established by reason or by mutual consent are the only ones by which to resolve differences between sovereigns': Bello, *op. cit.* above (p. 260 n. 23), at p. 23. Shea was of the same opinion: *The Calvo Clause* (1955), pp. 24-7.

²⁵³ The eminent Venezuelan historian Rufino Blanco Fombona placed Bello 'as a writer on international law, between Vattel, whom he followed frequently, and Wheaton, who frequently followed him. His originality . . . lies in his essentially Latin-American viewpoint, in being the first who, as a South American, dealt with international law and expounded principles which joined abstract justice

Much of Bello's writing, particularly on the law of war and prizes, is outdated. Other topics, however, retain a disturbing immediacy. His comments on intervention and the law of State responsibility were not intended as mere exercises in legal history. Instead, writing at a time when intervention often seemed the norm rather than the exception in international law, he articulated a doctrine of non-intervention which, after years of disagreement and debate at international conferences, in 1948 achieved full acceptance in the Charter of the Organization of American States.²⁵⁴ Unlike Carlos Calvo, he was not content to compile a list of grievances in order to justify a non-interventionist position. Rather, as early as 1832 he also offered a formula by which to judge the legality of an intervention—that the danger which the intervening State seeks to avert must be great, immediate and obvious. Recent interventions in Central America and in the Caribbean might not satisfy Bello's standard.

Similarly Bello inveighed against the misuse of political asylum by exiles to organize armed interventions against their countries of origin. The problem was confronted by the five Central American nations at the 1922–3 Washington Conferences where the delegates—many of whom undoubtedly had read Bello at university—agreed to prevent the use of their territories by exiles as staging areas for attacks on neighbouring States.²⁵⁵ Unfortunately this vexing issue has not yet been resolved, as contemporary Central American events amply demonstrate.

with our own special circumstances': *Grandes Escritores de America* (1917), p. 15. James Scott Brown, former President of the American Society of International Law and the first Editor-in-Chief of the *American Journal of International Law*, stated in a speech accepting honorary membership in the Faculty of Law and Political Sciences at the University of Chile that the *Principios* 'was the first complete and systematic treatise on international law to appear in the New World': Introduction to Bello, op. cit. above (p. 260 n. 23), at p. cxxix. Some contemporaries and colleagues regarded Calvo differently. His obituary, presumably written by James Scott Brown, remarks that 'Industry was his great gift, and what industry could accomplish, he did. He carefully examined a doctrine in the light of its history and origin; he cited the literature on the subject and stopped . . . He was a master mechanic; he was neither a thinker nor an artist': 'Carlos Calvo', *American Journal of International Law*, 1 (1907), pp. 137–8. For a less critical appraisal, see De Peralta, 'Carlos Calvo', *Annuaire de l'Institut de Droit International*, 1906, p. 186.

²⁵⁴ Iñiguez, 'El Principio de la No Intervención en America', in L. Villalba (ed.), *El Libertador, Sucre y Bello y la No Intervención* (1976), pp. 115, 126–36. Article 15 (now 18) of the OAS Charter states: 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements': quoted in Thomas and Thomas, op. cit. above (p. 279 n. 92), pp. 421–2. For a summary of Latin-American efforts at international conferences to secure the acceptance of the principle of non-intervention, see *ibid.* at pp. 55–64.

²⁵⁵ The 1923 General Treaty of Peace and Amity set forth 'the obligation, in case of civil war, not to intervene in favor of or against the Government of another Republic' and 'the obligation on the part of each Government not to intervene in the internal political affairs of any other Republic and not to permit within the territory the organization of revolutionary movements against the recognized Government of any other Central American Republic . . .': Scott, 'The Central American Conference', *American Journal of International Law*, 17 (1923), pp. 313, 315.

Bello not only was the first Latin American to formulate a doctrine of non-intervention, but also was an early advocate of the principle of self-determination. Although Vattel had written that 'every society has a right to choose that mode [of government] which suits it best',²⁵⁶ Bello stretched the concept further when he proclaimed the right to break away from colonial powers and to be recognized as independent entities by older, more established nations.²⁵⁷ Although such comments may seem commonplace today, in 1832 they were exciting and innovative and, in so far as they seemed to confirm the right of revolution, undoubtedly were perceived as daring if not dangerous in more conservative non-Latin-American circles.

Bello's advocacy of the doctrine of equal treatment for aliens and nationals and his support of the exhaustion of local remedies rule also enjoyed early and near unanimous continental support. Thus, the first Inter-American Conference in Washington (1889-90) recommended that the governments represented recognize as principles of American international law that (a) aliens are entitled to all the civil rights of nationals and may invoke them in form and substance and on appeal 'on the same terms as nationals', and (b) a State will not recognize that aliens have any obligations or duties 'other than those which have been established in favor of nationals in the same case by the Constitution and the laws'.²⁵⁸ This is still the Latin-American position.

Similarly Bello's insistence that a State could not automatically be held internationally liable for damage to aliens caused by revolutionary factions or mobs has been consistently upheld by Latin-American States. For example, when in 1923 Mexico agreed to establish Special Claims Commissions to adjudicate claims arising out of 'revolutionary disturbances', it insisted that its decision was dictated by generosity and goodwill rather than by legal obligation. Thus, while the members of the General Claims Commission were to base their decisions on 'principles of international law, justice and equity', the Special Claims Commissions were to be guided solely by the 'principles of justice and equity'.²⁵⁹

Yet Bello was basically a conservative thinker. Although the origins of the contractual Calvo Clause are discernible in his writings, he did not seek to abolish diplomatic intervention in all cases, nor assert, as have proponents of the New International Economic Order, that alien claims should be litigated exclusively in national courts with sole reference to domestic law.²⁶⁰ Similarly, nowhere in his works is there any indication

²⁵⁶ Vattel, op. cit. above (p. 270 n. 56) (4th edn., 1811), at p. 8.

²⁵⁷ Bello, op. cit. above (p. 260 n. 23), at pp. 36-9.

²⁵⁸ The US voted against the resolution. All the Latin-American nations, except for Haiti, which abstained, voted in its favour: M. MacKenzie, *Los Ideales de Bolívar en el Derecho Internacional Americano* (1955), pp. 158-9.

²⁵⁹ A. Feller, *The Mexican Claims Commission 1923-1934* (1935), pp. 222-4.

²⁶⁰ The extent of Latin-American influence in the working group which drafted the UN Declaration on the Establishment of a New International Economic Order and the Charter of Economic

that Bello believed in the existence of an American or regional international law somehow distinct and apart from general international law. Although the existence of an American international law was championed vigorously by Judge Alejandro Alvarez of the Permanent Court of International Justice as a defence against the pretensions of more powerful States, Bello's tactic of achieving the modification and reform of international legal norms by operating within the existing legal structure has prevailed among most Latin-American jurists and scholars.²⁶¹

Bello thus was and is securely in the mainstream of Latin-American legal thought, and his observations, based upon extensive personal experience and research, became guides for the future conduct of the majority of Latin-American statesmen.²⁶² His influence on legislative

Rights and Duties of States is described in detail in García-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation', *Lawyer of the Americas*, 12 (1980), p. 1. Article 2 of the Charter rejects all diplomatic protection and enables a State to decide unilaterally upon the compensation it will offer deprived aliens without reference to the requirements of international law. Its provisions have been described '... as no more than thinly disguised attempts to endow the Calvo Doctrine ... with limited international status': Lillich, 'The Diplomatic Protection of Aliens Abroad: An Elementary Principle of International Law Under Attack', *American Journal of International Law*, 69 (1975), pp. 359, 361. García-Amador, formerly Rapporteur of the International Law Commission's committee on codification of the law of State responsibility, suggests that the Charter goes too far, and that the Latin-American nations are not as comfortable as other Third World States with rejecting entirely the doctrine of State responsibility: loc. cit., at p. 52.

²⁶¹ In any case, the dispute over the existence or non-existence of an American international law now 'resolves itself largely into a terminological squabble': Butler, 'Latin American Approaches to International Law', *International Journal of Politics*, 6 (1976), pp. 1, 130. The Alvarez thesis is explained in H. Jacobini, *A Study of the Philosophy of International Law as seen in the Works of Latin American Writers* (1954), pp. 124-33. See also discussion in Dawson, 'Contributions of Lesser Developed Nations to International Law: The Latin American Experience', *Case Western Reserve Journal of International Law*, 13 (1981), pp. 37, 54-8. 'Bello, taking inspiration from the best of the European and Anglo-Saxon doctrine of the era, but positively conditioned by the realities and needs of Latin America, did not commit the excesses which so many committed after him ... of positing the existence of an American International Law with different and independent solutions distinct from General International Law': Espiell, 'Andrés Bello y su Proyección en el Derecho Internacional', *Revista Nacional de Cultura*, 43 (1982), pp. 299, 304.

²⁶² Modern Latin-American legal perceptions of non-intervention, diplomatic protection, denial of justice and exhaustion of local remedies closely follow the concepts first articulated by Bello: Carrizosa, 'La Protección Diplomática en la Teoría y la Práctica Contemporánea', *Primeras Jornadas Latino Americanas de Derecho Internacional* (ed. Universidad Católica Andrés Bello, 1979), pp. 493, 527-8. As Judge Padilla Nervo wrote in 1970, 'International law lays upon every State in whose territory foreign natural or juristic persons reside, remain, operate or even simply possess property, an obligation towards the State of which such persons are nationals: the obligation to afford them certain treatment. That treatment, which is defined most usually and in greater detail by the rules of treaty law, nevertheless has its minimum requirements laid down by customary international law. Those minimum requirements consist essentially ... of certain rights and in the granting, at the same time, of the possibility of making use, if necessary, of appropriate judicial or administrative remedies.

'Correlative with that obligation, the State of which such persons are nationals has, at the international level, a right to require the State which is bound by the obligation to act in conformity therewith, and it has a right, if occasion arises, to submit a claim in proper form and through accepted channels, should that obligation fail to be discharged. That is precisely what is known as the exercising of diplomatic protection': separate opinion of Judge Padilla Nervo, *Barcelona Traction* case, *ICJ Reports*, 1970, at pp. 253-4.

draftsmen throughout nineteenth-century Latin America also is apparent, as is the debt owed him by Carlos Calvo and Luis Drago, whose fears and concerns he anticipated by nearly two generations.²⁶³

²⁶³ Yet Bello's appeal transcends the Western Hemisphere. On 4 November 1981, to commemorate the bicentennial of Bello's birth, the UN met in New York in Special Session. As President of the Asian Group, His Excellency Naiz A. Naiz, Permanent Representative of Pakistan, stated: 'The legacy of Andrés Bello is not restricted to Latin America. He is one of the great visionaries who have given a direction to the people of the Third World in the assertion of their freedom, human equality, dignity and prosperity . . . Andrés Bello is indeed a shared heritage of all peoples who cherish the ideal of a bright future for mankind': Fundación La Casa de Bello (ed.), *Homage to Andrés Bello in the United Nations Organization* (1981), pp. 31-2.

NOTES

TOWARD A WORLD WITHOUT REFUGEES: THE UNITED NATIONS GROUP OF GOVERNMENTAL EXPERTS ON INTERNATIONAL CO-OPERATION TO AVERT NEW FLOWS OF REFUGEES*

By LUKE T. LEE¹

'It is far better to treat the causes of a malady, and not just its symptoms.' (*Old proverb*)

'The Statue of Liberty . . . represents our commitment to freedom and our tradition of offering safe haven to those fleeing persecution. We recognize our obligation to keep faith with these principles and this tradition.' (*Report of the Indochinese Refugee Panel, Washington, 1986*)

I. INTRODUCTION

THE foregoing passages typify two main approaches to the refugee problem: the preventive and the ameliorative. These two are actually complementary in nature. For an approach based exclusively on amelioration ignores the root causes of refugees, leaving unabated man's inhumanity to man and ultimately straining to the limit the compassion of even the good Samaritan. On the other hand, preoccupation with prevention alone overlooks the practical needs of refugees who have existed since, as some would say, the expulsion of Adam and Eve from the Garden of Eden. Thus, only through a simultaneous, judicious combination of the two could the refugee problem be realistically addressed.

Self-evident though this may be, the responses to the refugee problem have, until the last few years, been confined to the ameliorative approach—*after* refugees have already come into existence. It is time that the preventive aspects be given due attention, and a preliminary assessment made of recent attempts at striking a balance.

Since 1980 there have been two initiatives at the UN to avert new flows of refugees: the so-called Canadian initiative in the Commission on Human Rights and the initiative of the Federal Republic of Germany in the General Assembly.² Their preventive approach to the refugee problem stands in marked contrast to the traditional emphasis on caring for and maintaining refugees in countries of asylum or facilitating their resettlement in third countries, with the assistance of the UN High Commissioner for Refugees (UNHCR)³ and the UN Relief

* © Luke T. Lee, 1987.

¹ Director of Plans and Programs, Office of the US Co-ordinator for Refugee Affairs. The author was formerly a member of the UN Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees. The views expressed in this paper do not necessarily reflect those of the US Government.

² See Lee, 'The UN Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees', *American Journal of International Law*, 78 (1984), p. 480.

³ GA Res. 428 (V), Annex: Statute of the Office of the UN High Commissioner for Refugees, *General Assembly Official Records*, 5th Session, Supplement 20 at p. 46, UN Doc. A/1775 (1950).

and Works Agency for Palestine Refugees in the Near East (UNRWA).⁴ The completion of the *Study on Human Rights and Massive Exoduses* by Special Rapporteur Sadruddin Aga Khan in December 1981⁵ essentially ended the Canadian initiative.⁶ The UN Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees (hereinafter referred to as 'the Group'), which reflected the FRG initiative, began its work in April 1983 and submitted its report to the General Assembly in May 1986.⁷ Will this initiative meet the same fate as its Canadian counterpart now that it too has completed its report? Or will the world witness a significant decline in refugee flows as a result thereof?

This paper describes the background and progress of the work of the Group, followed by a comparison of the Canadian and the FRG initiatives. After outlining some special features of the Group, it concludes with an assessment of the potential of the FRG initiative for averting new massive flows of refugees.

II. BACKGROUND

In a letter dated 24 September 1980 addressed to the Secretary-General, Hans-Dietrich Genscher, the Vice-Chancellor and Minister for Foreign Affairs of the Federal Republic of Germany, requested the inclusion in the agenda of the thirty-fifth session of the General Assembly of an additional item entitled 'International co-operation to avert new flows of refugees'.⁸ On 2 October the General Assembly decided to include the item in its agenda and allocate it to the Special Political Committee. By a vote of 93 to 15, with nine abstentions, the Committee on 5 December recommended to the General Assembly the adoption of a draft resolution.⁹ The operative part of the resolution, as subsequently adopted by the General Assembly on 11 December by 105 votes to 16, with fourteen abstentions, states that the General Assembly:

1. *Strongly condemns* all policies and practices of oppressive and racist regimes as well as aggression, alien domination and foreign occupation, which are primarily responsible for the massive flows of refugees throughout the world and which result in inhuman suffering;

2. *Invites* all Member States to convey to the Secretary-General their comments and suggestions on international co-operation to avert new flows of refugees and to facilitate the return of those refugees who wish to return;

3. *Requests* the Secretary-General to report to the General Assembly at its thirty-sixth session, for its further examination and thorough study, the views, comments and suggestions expressed by Member States, together with those expressed on the item at its thirty-fifth session, including all additional contributions pertaining to the matter which he may receive from other United Nations organs;

4. *Decides* to include in the provisional agenda of its thirty-sixth session the item entitled 'international co-operation to avert new flows of refugees'.¹⁰

After reviewing the comments of twenty-six governments and six UN organs or specialized agencies, the General Assembly, by Resolution 36/148 of 16 December 1981, decided to establish a seventeen-member Group of Experts to

⁴ Established by GA Res. 302 (IV) of 8 December 1949.

⁵ UN Doc. E/CN.4/1503 (1981).

⁶ Martin, 'Large-Scale Migration of Asylum Seekers', *American Journal of International Law*, 76 (1982), pp. 598, 602.

⁷ UN Doc. A/41/324 (13 May 1986). The conclusions and recommendations of the report were endorsed by the General Assembly in Res. A/41/70 of 3 December 1986 by consensus.

⁸ UN Doc. A/35/242 (1980).

⁹ UN Doc. A/SPC/35/L.21/Rev. 1, as amended (1980).

¹⁰ GA Res. 35/124 (1980).

study the root causes of massive flows of refugees and to recommend steps for international co-operation to avert new flows. Members of the Group were to be 'appointed by the Secretary-General, upon nomination by the Member States concerned after appropriate consultation with the regional groups and with due regard to equitable geographical distribution'.¹¹ Since more than twenty countries sought membership in this Group, the General Assembly, by Resolution 37/121 of 16 December 1982, enlarged the Group to twenty-five.¹² It was instructed to submit its report to the Secretary-General in time for deliberation by the General Assembly at its thirty-eighth session, beginning in September 1983.¹³

As the guiding principles for the Group, Resolution 36/148 emphasized 'the right of refugees to return to their homes in their homelands' and reaffirmed the right 'of those who do not wish to return to receive adequate compensation'.¹⁴ The resolution also requested the Group to undertake 'a comprehensive review of the [refugee] problem in all its aspects';¹⁵ develop 'recommendations on appropriate means of international co-operation in this field, having due regard to the principle of non-intervention in the internal affairs of sovereign States';¹⁵ and take into account the comments and suggestions from member States and UN organs in response to Resolution 35/124.¹⁶

The Group began its work inauspiciously. Its first session, 12-15 April 1983, was plagued by procedural wrangles: the absence of the elected chairman, Ambassador Ibra Duguène Ka of Senegal to Tunisia; disagreement over the size and composition of the 'bureau'; and even over the applicable rules of procedure themselves.¹⁷ There was genuine fear that the Group would die a premature death in the face of apparently irreconcilable differences between refugee-generating and refugee-receiving countries.

At the second session, 6-10 June 1983, Ambassador Ka was again absent, and another official was nominated by Senegal to replace him. The Group thereupon

¹¹ Para. 4 of the operative part of Resolution 36/148 (1981).

¹² Of the twenty-five members subsequently appointed by the Secretary-General, one each was nominated by Afghanistan, Australia, Austria, Bulgaria, Cuba, Czechoslovakia, Djibouti, Ethiopia, France, the Federal Republic of Germany, Honduras, Japan, Lebanon, Mexico, Nicaragua, Pakistan, Senegal, Somalia, Sudan, Thailand, Togo, the USSR, the US and Vietnam. The twenty-fifth seat was rotated among the Latin-American, African and Asian regions.

¹³ GA Res. 37/121 (1982), para. 9.

¹⁴ GA Res. 36/148 (1981), para. 3. The genesis of these rights may be traced to Resolution 194 (III) of 11 December 1948, which stated in its para. 11 that the General Assembly:

'Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible. . . .'

This paragraph has been recited and reaffirmed every year by the General Assembly. See Lee, 'The Right to Compensation: Refugees and Countries of Asylum', *American Journal of International Law*, 80 (1986), pp. 532, 535.

¹⁵ GA Res. 36/148 (1981), para. 5.

¹⁶ *Ibid.*, para. 7. Noteworthy among the comments and suggestions from member States were those from the Federal Republic of Germany, which contain ten-point 'Guide-lines for the Conduct of States' and outline practical preventive measures. See Report of the Secretary General, 'International Co-operation to Avert New Flows of Refugees', *General Assembly Official Records*, 36th Session, Agenda Item 66, at pp. 18-27, UN Doc. A/36/582 (1981).

¹⁷ Lee, loc. cit. above (p. 317 n. 2), at p. 482.

elected Koffi Adjoyi, Togo's Deputy Permanent Representative to the UN, as its chairman.

With its chairman in place, the Group proceeded with substantive work by first analysing its own mandate, including questions related to terms. It decided that its work must conform with its own title: namely, to develop 'international co-operation to avert new flows of refugees'. It emphasized the need to improve 'international co-operation' in the context of the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN.¹⁸ While valuing the lessons or experiences derived from 'past and present' flows of refugees, it underscored its *future*-oriented approach indicated by the phrasing 'to avert *new* flows of refugees'.¹⁹

As for the term 'refugee', the Group deemed it inadvisable to define it, other than to achieve a 'working understanding . . . on the phenomenon the Group would want to address'.²⁰ This flexibility enabled the Group subsequently to adhere to²¹ or depart from²² the conventional definition of refugee where circumstances, in the view of the Group, so warranted.

Finally, the Group viewed its mandate as limited to the 'coerced'²³ and 'massive'²⁴ movements, which would preclude the consideration of traditional migrations and other voluntary movements of people, as well as the movements of individual refugees.

The Group's requests that its mandate be renewed and that two two-week sessions be held in 1984 were approved by the General Assembly. Indeed, similar requests were subsequently approved by the General Assembly until the Group completed its eighth session in May 1986.²⁵

At its third session, 26 March–6 April 1984, the Group reviewed the circumstances causing new massive flows of refugees. It divided these circumstances into 'man-made' and 'natural' causes, subdividing the former into 'political causes' and 'socio-economic factors'.²⁶ In distinguishing 'factors' from 'causes', the Group took the definition of 'refugee' as one who is outside his own country and has a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.²⁷ Accordingly, the Group equated 'man-made' with 'political' causes, which, however, may be aggravated or compounded by 'socio-economic factors'. The implication is clear: 'socio-economic factors' by themselves do not cause refugee flows.

The Group identified as major 'political causes' of refugee flows 'wars and armed conflicts' resulting from 'acts of aggression, alien domination, foreign

¹⁸ GA Res. 2625 (XXV). See UN Doc. A/41/324 (13 May 1986), para. 19.

¹⁹ Ibid., para. 20 (emphasis added).

²⁰ Lee, loc. cit. above (p. 317 n. 2), at p. 482.

²¹ See text accompanying n. 27 below.

²² See text accompanying n. 32 at p. 321 below.

²³ UN Doc. A/41/324 (13 May 1986), paras. 25–6.

²⁴ Ibid., para. 27.

²⁵ See GA Res. 37/121 (1982), 38/84 (1983), 39/100 (1984) and 40/166 (1985).

²⁶ UN Doc. A/41/324 (13 May 1986), Section III.

²⁷ See Convention Relating to the Status of Refugees, 1951, *United States Treaties and Other International Agreements* (hereinafter *UST*), vol. 19, p. 6259, *Treaties and Other International Acts Series* (hereinafter *TIAS*), No. 6577, *United Nations Treaty Series*, vol. 189, p. 150, Article 1 (A) (2). See also the 1967 Protocol Relating to the Status of Refugees, *UST*, vol. 19, p. 6223, *TIAS*, No. 6577, *United Nations Treaty Series*, vol. 606, p. 267, Article I (2) (which incorporates the above definition).

armed intervention and occupation', as well as colonialism, oppressive regimes, apartheid and violations of human rights and fundamental freedoms.²⁸ As for 'socio-economic factors', the Group cited the 'prolongation of the state of under-development inherited from colonialism' and the 'world economic situation and its effects on the critical economic situation of most of the developing countries, as reflected particularly in economic recession, balance-of-payments problems, deterioration of the terms of trade, indebtedness, inflation etc.'²⁹ Left unmentioned were such endogenous factors of the post-independence era as 'deficiencies in institutional and physical infrastructures, economic strategies and policies that have fallen short of achieving their objectives, disparities in urban and rural development and income distribution, insufficient managerial/administrative capacities and lack of financial resources, the demographic factors and political instability manifested in a large and growing population of refugees'.³⁰

Of considerable controversy is the characterization of natural disasters (e.g. heavy floods, prolonged drought, soil erosion, earthquakes and desertification) as 'causes' for massive flows of refugees.³¹ The same rationale for considering 'socio-economic' conditions as mere 'factors', rather than 'causes', of refugee flows should, strictly speaking, apply also to natural disasters, since the essential element of 'persecution' is missing. However, given the Group's flexibility in defining 'refugee', the fact that large numbers of people driven across national boundaries by drought or spreading deserts in Africa have been treated as 'refugees'³² apparently influenced the Group's decision to include natural disasters as 'causes', instead of 'factors', in relation to refugee flows.

The Group next considered the 'appropriate means' to avert new massive flows of refugees from the twin criteria of 'international instruments, norms and principles', and 'international machinery and practices'.³³ With regard to the former, the Group examined the relevance of the Charter of the UN, the Universal Declaration of Human Rights and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN, as well as twelve other international instruments³⁴ and 'norms of international custom'. It regarded these instruments and norms as already adequate, incorporating as they do such principles as non-intervention in the internal affairs of States, non-use of force or the threat thereof in settling international disputes, respect for human rights, and the obligations of States to co-operate among themselves and with the UN in political, economic, social and humanitarian matters. What was lacking, according to the Group, was their effective implementation;³⁵ hence the importance of 'international machinery and practice'.

An evaluation of 'international machinery and practice' by the Group led it to conclude that, despite the existence of a broad range of UN organs dealing with political and economic problems of refugee flows, the effectiveness of these organs left much to be desired. The Group regarded as essential the following:

²⁸ UN Doc. A/41/324 (13 May 1986), section III-A-1.

²⁹ Ibid., section III-A-2.

³⁰ See draft agreement of the special General Assembly session on the economic crisis in Africa, excerpted in *New York Times*, 2 June 1986, p. A8, col. 1.

³¹ UN Doc. A/41/324 (13 May 1986), section III-B.

³² See, e.g., 'Ethiopia: A Closer Look', in US Committee for Refugees, *World Refugee Survey: 1985 in Review* (1986), p. 44.

³³ UN Doc. A/41/324 (13 May 1986), section IV.

³⁴ Ibid., Annex III.

³⁵ Ibid., para. 53.

that States should fully observe and implement the decisions of the General Assembly, the Security Council, the Economic and Social Council and others; that the Secretary-General should assume a more active role in averting new massive flows of refugees; and that projects which directly or indirectly help avert new flows of refugees should be given priorities for assistance.³⁶ It comes as no surprise, therefore, that the improvement and strengthening of international machinery and practices should occupy the serious attention of the Group in its conclusions and recommendations.³⁷

The Group entered the most critical phase of its work during the sixth session in June 1985, when it began to formulate recommendations to the General Assembly. Crucial to its success would be its ability to adopt concrete guidelines or standards of conduct for States and international organs to avert new massive flows of refugees. For if the Group's recommendations could not go beyond mere expressions of generality—repeating the usual litany of paying due respect to the principles of the Charter of the UN, etc.—nothing significant would have been added to the many instruments already in existence. On the other hand, if the Group could succeed in recommending concrete measures or courses of action for States and international organs to adopt through a combination of realism and idealism, then the establishment of the Group would have been justified.

Two opposing schools of thought indeed contended for superiority at this critical session. One, advanced by East European and communist countries, called for a general statement of principle: that States should respect the Charter of the UN and the Declaration on Friendly Relations and Co-operation among States, particularly those principles concerning non-intervention in the internal affairs of any State and non-use of force or the threat thereof against the territorial integrity or political independence of any State, the violation of which would be prone to cause new massive flows of refugees.³⁸ The other school, supported by Western and many third-world countries, insisted on more specific standards as a code of conduct to avert new massive flows of refugees. Included in such a code would be the right of refugees to voluntary repatriation and adequate compensation; regional and subregional co-operation among States to prevent future massive flows of refugees; and the promotion of civil, political, economic, social and cultural rights to ensure that no groups of population would be forced, directly or indirectly, to leave their own country on account of their nationality, ethnicity, race, religion or language.³⁹ Of special interest was the proposed designation of a 'special representative of the Secretary-General on international co-operation to avert new massive flows of refugees' who would serve as the focal point in the UN system to monitor developments which threaten to cause new massive flows of refugees, to mobilize States concerned and competent UN organs to deal with such flows, to establish an early warning system, and to review preventive measures taken and report thereon to the General Assembly or the Security Council.⁴⁰

³⁶ UN Doc. A/41/324 (13 May 1986), paras. 56-61.

³⁷ *Ibid.*, section V.

³⁸ 'Text proposed for consideration of the Group at the 18th meeting on 12 June 1985 during the consideration A/AC.213/1985/WP.5, section B, paragraph 3(b)' (mimeographed by the UN Secretariat).

³⁹ UN Doc. A/41/324 (13 May 1986), para. 66 (c)-(f).

⁴⁰ 'Working Paper Submitted by the Chairman Pertaining to the Substantive Consideration of the Programme of Work', UN Doc. A/AC.213/1985/WP.5, section B, para. 3(g). Compare this with

What eventually emerged from the Group, as is wont to be the case with all organs that reach decisions by consensus, was a compromise: to the general statement of principles, as advocated by East European and communist countries, were added the more specific standards as mentioned above; instead of the proposed designation of a special representative of the Secretary-General, the latter was given a modified role to be discussed in section V (d) below.

III. COMPARISON WITH THE CANADIAN INITIATIVE

The completion of the Group's report marked a watershed in the FRG initiative and inevitably invites comparison with the Canadian initiative. Such comparison may focus on their organizational and philosophical bases.

(a) *Organizational Base*

The Canadian initiative was based on the UN Commission on Human Rights. Respectable though that Commission is,⁴¹ it is but one of numerous bodies reporting to the Economic and Social Council, which in turn reports to the General Assembly. Moreover, the output of the Canadian initiative, *Study on Human Rights and Massive Exoduses*, bore the imprint of only one man—former UN High Commissioner for Refugees Sadruddin Aga Khan.⁴² In an area as politically sensitive as averting new flows of refugees, the centuries-old adage of 'no representation, no taxation' found expression in 'no representation, no commitment' by governments. Consequently, despite high commendations given to the study for its innovative suggestions by a number of States and the Secretary-General,⁴³ the Canadian initiative did not essentially survive the completion of the study in December 1981.

The FRG initiative, on the other hand, was grounded in the Special Political Committee of the General Assembly, which created the Group and oversaw its activities. The Assembly's annual review of and debate on the draft reports of the Group before extending its mandate⁴⁴ evidenced the continual involvement of member States in the work of the Group. The resultant report could not but reflect the sentiment and will of the entire membership of the UN, particularly in view of the consensus rule that governed the Group's deliberations⁴⁵ and the composition of the Group's membership.⁴⁶

the proposed appointment of a 'Special Representative for Humanitarian Questions' under the Canadian initiative, whose task would basically be: '(a) to forewarn; (b) to monitor; (c) to de-politicize humanitarian situations; (d) to carry out those functions which humanitarian agencies cannot assume because of institutional/mandatory constraints; (e) to serve as an intermediary of goodwill between the concerned parties': UN Doc. E/CN.4/1503 (1981), Recommendations, para. (8).

⁴¹ At its first session on 16 February 1946, the ECOSOC established the Commission on Human Rights to submit proposals, recommendations and reports to the Council regarding an 'international bill of rights': UN Doc. E/20 (1946), section A-2-(a). From this mandate emerged the Universal Declaration of Human Rights, proclaimed by the General Assembly on 20 December 1948 in Resolution 217 (III).

⁴² UN Doc. E/CN.4/1503 (1981).

⁴³ See remarks by Ved P. Nanda, Chairman of the Panel on Human Rights and the Movement of Persons, *Proceedings of the 78th Annual Meeting of the American Society of International Law, 1984* (1986), at pp. 339-40.

⁴⁴ Loc. cit. above (p. 320 n. 25).

⁴⁵ See section IV (c), below.

⁴⁶ See section IV (b), below.

(b) *Philosophical Base*

At the core of the Canadian initiative was, as the title and content of the Special Rapporteur's study indicate, its central concern for human rights, violations of which frequently resulted in 'large exoduses of persons and groups'.⁴⁷ The philosophical underpinning of the FRG initiative, on the other hand, was more clearly its concern not only for human rights, but also for the 'great political, economic and social burdens [of massive flows of refugees] upon the international community as a whole, with dire effects on developing countries, particularly those with limited resources of their own'.⁴⁸ The latter initiative was thus more broadly based than the former. It may be noted that the Secretary-General appeared to concur in the validity of the broad-based approach when he noted:

The root causes of situations involving mass exoduses, are often complex. They may relate to political or military conflicts, internal or external, to civil strife, persecution or other forms of violations of human rights, be they civil and political or economic, social and cultural rights.⁴⁹

In addition to suffering from a narrower theoretical base, the Special Rapporteur's study undercut its own usefulness by stating at the outset:

In connection with the conceptual framework of this Study, the Universal Declaration of Human Rights of 1948 has been used as a basic text against which the study of mass exodus has been carried out. It is however fully realized that the 1948 document was essentially a declaration of intent on the part of States, and had no binding effect. Although it had considerable impact as a result in terms of moral pressure, particularly coming as it did in the atmosphere at the post-war era, large portions of the Declaration have, by the very nature of things, remained unheeded by many States in practically every continent.⁵⁰

The study stressed that 'this declaration of intent needed to be translated into more concrete terms leading to tangible action', particularly through the 1966 International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights.⁵¹ However, it also admitted that 'the majority of the countries from which a mass exodus has occurred during the period of the Study has not so far acceded to those Covenants'.⁵² It therefore implied that, unless and until the two Covenants have been widely acceded to by States, particularly the refugee-generating States, the human rights approach could only be of 'moral' value, without any legally 'binding effect'.

Thus, ironically, the study, based as it was on the human rights approach, appeared to concede the futility of such an approach in averting mass exoduses. This self-defeating attitude did not augur well for the success of the Canadian initiative.

It should be noted that both the Canadian and the FRG initiatives shared an underlying philosophical and legal assumption: deplorable as massive flows of refugees may be, their prevention must not be effected by either the erection by

⁴⁷ See Resolution 30 (XXXVI) of 11 March 1980 of the UN Commission on Human Rights: loc. cit. above (p. 318 n. 5), at p. 5.

⁴⁸ UN Doc. A/41/324 (13 May 1986), para. 4.

⁴⁹ See Report of the Secretary-General, UN Doc. E/CN.4/1440 (1981), para. 6; loc. cit. above (p. 318 n. 5), para. 13.

⁵⁰ Loc. cit. above (p. 318 n. 5), para. 19.

⁵¹ Ibid., para. 20.

⁵² Ibid., para. 23.

refugee-generating States of physical barriers to exoduses like the 'Berlin Wall', or the adoption by refugee-receiving States of such policies or tactics as *refoulement*, rejection or 'pushbacks' at the border, 'push-offs' of 'boat people' from the territorial sea or oil rigs, or 'humane deterrence' through condoning piracy, non-rescues at sea, imprisonment or detention in closed camps. For both of these preventive approaches may well violate human rights⁵³ and international law,⁵⁴ and in any event cause great hardship to the individuals involved. How to steer a course between averting new flows of refugees and preventing the exodus or entry of persecuted persons is a difficult subject ripe for in-depth research.⁵⁵

⁵³ The following provisions of the Universal Declaration of Human Rights would be violated:

Article 9: 'No one shall be subjected to arbitrary arrest, detention or exile.'

Article 13 (2): 'Everyone has the right to leave any country, including his own, and to return to his country.'

Article 14 (1): 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.'

⁵⁴ The following treaties, among others, would be violated in the event of non-rescues at sea: the 1910 Brussels International Convention for the Unification of Certain Rules with regard to Assistance and Salvage at Sea, *Statutes at Large*, vol. 37, p. 1658, *Treaty Series*, No. 576, Bevans, *Treaties and other International Agreements of the United States*, vol. 1, p. 780, Article 11; the 1958 Geneva Convention on the High Seas, *UST*, vol. 13, p. 2312, *TIAS*, No. 5200, *United Nations Treaty Series*, vol. 450, p. 82, Article 12; the 1974 London Convention for the Safety of Life at Sea, *TIAS*, No. 9700, Chapter V, Regulation 10; the 1982 Convention on the Law of the Sea, UN Doc. A/CONF.62/122 (1982), reprinted in *International Legal Materials*, 21 (1982), p. 21, Article 98.

Since the Geneva Convention on the High Seas aimed at codifying customary international law (see its preamble), all of its provisions 'must therefore be taken presumptively to be declaratory of customary international law': Baxter, 'Multilateral Treaties as Evidence of Customary International Law', this *Year Book*, 41 (1965-6), pp. 288, 290. They may well therefore be binding on all States, whether or not parties to the Convention.

In the case of *refoulement*, Article 33 (1) of the 1951 Convention Relating to the Status of Refugees (loc. cit. above, p. 320 n. 27), provides: 'No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

Condoning piracy as a 'humane deterrence' to influx of refugees would be condoning 'an offence against the law of nations . . . an offence against the universal law of society, a pirate being deemed an enemy of human race': see *United States v. Smith*, 5 Wheat. 153, 161-2 (1820) (statement of Storey J). See also *In re Piracy Jure Gentium*, [1934] AC 586.

⁵⁵ Among the many intractable problems confronting the UNHCR and the countries of first asylum and resettlement is the legal status of the more than 275,000 Indo-Chinese refugees who walked across the northern borders of Vietnam and Laos into China (the so-called 'foot people', in contradistinction to the 'boat people' who escaped southward by sea). Many of them have recently been found to leave China by boat for South-East Asia via Hong Kong, and attempts are made to force their 'return' to China. Are these so-called 'ex-China resettles' to be denied the opportunity for UNHCR assistance and asylum or resettlement in another country despite the following facts:

- (a) they had never intended to resettle in China;
- (b) there was no other way for them to escape by land from northern Vietnam or Laos except through China, just like Austria being a way station for refugees escaping from Eastern Europe;
- (c) their urban background in Vietnam as merchants, artisans and restaurateurs did not lend itself to picking tea leaves or tending citrus in State farms (the more fertile land having already been claimed in overpopulated China);
- (d) since a major characteristic of 'resettled' refugees is their dispersion and integration in local societies in which they reside and work, the continued 'segregation' of Indo-Chinese refugees from local societies would seem to belie the fact that they have been 'resettled'?

A former legal adviser of UNHCR regards the issue of whether a refugee already had asylum in another country as 'extraneous': Weis, 'The Concept of the Refugee in International Law', *Journal du droit international*, 87 (1960), pp. 928, 988.

IV. SALIENT FEATURES OF THE GROUP

Apart from the organizational and philosophical bases that distinguished the FRG from the Canadian initiative, the following salient features of the Group should be noted.

(a) *Disparate Interests*

Unlike such codification bodies as the International Law Commission and the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which dealt with subjects of a politically and ideologically neutral nature (in the sense that such subjects were of mutual interest and concern to all their members as well as to all nations, governed by self-interest as well as the rule of reciprocity),⁵⁶ the Group grappled with a subject that represented disparate interests to member States. What seemed advantageous, and hence acceptable, to refugee-generating countries might be disadvantageous, and hence unacceptable, to refugee-receiving countries, and vice versa. Why, for example, should Vietnam, Ethiopia, Cuba, Afghanistan or the USSR admit the 'obligations' to cease mass expulsion of citizens, to accept their voluntary and safe repatriation, and to pay them adequate compensation? Would they not rather prefer the status quo, thus remaining free to continue their activities without any moral or legal restraints? Indeed, such lack of mutuality of interests accounted for the early fear that the Group would be doomed to failure. That the Group did succeed in arriving at consensus at all may be due to some or all of the factors set forth below.

(b) *Membership*

It may be recalled that the membership of the Group was originally set at seventeen, but was enlarged to twenty-five after more than twenty countries sought membership.⁵⁷ For refugee-generating countries, their eagerness for membership was evidently due to their desire not to express contrition or forego further mass expulsions, but rather to prevent the Group from adopting, through their presence, measures or conclusions prejudicial to their perceived self-interest. Once they became members, however, they were inexorably drawn into a process which began to acquire a life of its own and from which they could not dissociate themselves. For unlike the Third UN Conference on the Law of the Sea, which, because of the vast scope of topics covered, made possible quid pro quos or package deals,⁵⁸ the Group's work, being narrowly focused, did not leave room for extensive manœuvring or bargaining. In this respect, the Group

⁵⁶ e.g. by drafting treaties that receive wide acceptance, the International Law Commission has codified such topics as diplomatic (*United Nations Treaty Series*, vol. 500, p. 241) and consular (*ibid.*, vol. 596, p. 261) relations, the law of treaties (UN Doc. A/CONF.39/27 (1969)), special missions (Annex to GA Res. 2530 (XXIV) (1969)) and the law of the sea (UN Doc. A/CONF.62/122 (1982)). The Special Committee was given the task of studying such principles as non-intervention in matters within the domestic jurisdiction of States, non-use of force or the threat thereof in settling international disputes, equal rights and self-determination of peoples and sovereign equality of States. All of these are basically of mutual interest to all countries, large or small, rich or poor, east or west, north or south.

⁵⁷ See text accompanying nn. 11-12 at pp. 318-19, above.

⁵⁸ Cf. Lee, 'The Law of the Sea Convention and Third States', *American Journal of International Law*, 77 (1983), pp. 541, 566-7.

provided a useful laboratory and model for international conferences devoted to narrowly defined issues over which the interests of member States are in basic conflict.

Since members of the Group were appointed by the Secretary-General not only 'with due regard to equitable geographical distribution', but also 'after appropriate consultation with the regional groups',⁵⁹ the consultation process ultimately led to the inclusion of major refugee-generating as well as refugee-receiving countries in all regions except the Middle East and southern Africa. Nevertheless, the apparently balanced composition of the membership was actually biased in favour of refugee-generating countries from the viewpoint of the total membership of the UN. Thus, if we disregard the temporary membership of the Group,⁶⁰ out of a total of twenty-four regular members, eight were from refugee-generating countries⁶¹ and sixteen from refugee-receiving countries.⁶² This ratio of one to two, if extrapolated to the total UN membership of 159, would have meant that there were fifty-three refugee-generating countries in the world!

Such imbalance, nevertheless, served a useful purpose: the conclusions and recommendations adopted by the Group cannot now be regarded as showing bias against refugee-generating countries in view of the latter's active participation in the Group and the lopsided composition of the membership in their favour. The incentive for universal compliance with these conclusions and recommendations has therefore increased immeasurably.

There was theoretically a qualificatory requirement for membership of the Group. Unlike members of the International Law Commission⁶³ and the Special Committee⁶⁴ who had to be lawyers, members of the Group, as its title indicates,

⁵⁹ Loc. cit. above (p. 319 n. 11).

⁶⁰ The following countries were represented in the Group for one year each by rotation: Haiti for Latin America in 1983, Lesotho for Africa in 1984 and the Philippines for Asia in 1985.

⁶¹ Classification of the countries concerned in the Group into refugee-generating and refugee-receiving is based on information provided in US Committee for Refugees, *World Refugee Survey: 1985 in Review* (1986), pp. 36-9. A word of caution is needed to put the classification in perspective. In the first place, the numbers of refugees received or generated vary from State to State—from large to insignificant. Some countries like Cuba, Ethiopia, Lebanon, Nicaragua, Sudan and Vietnam both generate and receive refugees; they are classified according to the predominant feature. The listing of some countries is based more on their policy orientation, influenced no doubt by their alliances or foreign-policy considerations, than on the numbers of refugees involved, such as the listing of Bulgaria and Czechoslovakia as refugee-generating, and of Senegal and Togo as refugee-receiving. Finally, classification may also be based on a country's status as a donor or recipient of UNHCR's or other refugee assistance funds; e.g. most of the major resettlement countries are also donor countries, while most of the first asylum, and even some refugee-generating, countries are recipient countries.

Subject to the above caveat, the refugee-generating countries represented in the Group were Afghanistan, Bulgaria, Cuba, Czechoslovakia, Ethiopia, Nicaragua, the USSR and Vietnam.

⁶² Australia, Austria, Djibouti, France, the FRG, Honduras, Japan, Lebanon, Mexico, Pakistan, Senegal, Somalia, Sudan, Thailand, Togo and the US.

⁶³ Article 2 of the Statute of the International Law Commission requires members to be 'persons of recognized competence in international law'. See also Lee, 'The International Law Commission Re-examined', *American Journal of International Law*, 59 (1965), pp. 545, 549-50.

⁶⁴ See para. 2 of the operative part of GA Res. 1966 (XVIII), *General Assembly Official Records*, 18th Session, Supplement 15 (A/5515), p. 70. See also Lee, 'The Mexico City Conference of the United Nations Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States', *International and Comparative Law Quarterly*, 14 (1965), pp. 1296, 1297.

should be 'governmental experts on international cooperation to avert new flows of refugees'. It should be noted, however, that 'experts' in this field were a rare breed indeed—numbering no more than a handful in the entire world—let alone the number of 'governmental experts'.

In actuality, the so-called 'governmental experts' were, with but a few exceptions, members of Permanent Missions to the UN of the countries concerned, ranging in rank from Third Secretary to Ambassador. The few exceptions were officials from Ministries of Foreign Affairs, Ambassadors or High Commissioners accredited to third States, and commissioners of refugee or immigration affairs. All of them were automatically appointed by the Secretary-General upon nomination by their governments, regardless of their qualifications.

Technically speaking, during the absence of an 'expert', his adviser could speak in his place only at the sufferance of the Group,⁶⁵ whereas in the absence of a diplomatic 'representative', his deputy or designee would *automatically* act on his behalf. Such a distinction was not, however, observed in practice by the Group.⁶⁶

Finally, the designation of members as 'experts' instead of 'representatives' afforded them a certain flexibility during debates. As 'experts', they could not, as a rule, justify delaying the proceedings on the ground that they required 'instructions' from their governments. Thus, unless they were provided with comprehensive instructions beforehand on all conceivable issues that might arise during debates, they would have to use their own discretion or 'expertise' on the spur of the moment. As no government could have anticipated all the issues that might arise, the flexibility afforded to members, often acting under group pressure, contributed to the progress of the work of the Group.

(c) *The Consensus Rule*

Although the Group was not technically barred from reaching agreement by majority vote,⁶⁷ it conducted itself as if bound by a unanimity rule. The delays and compromises that ensued were, however, more than compensated for by the added weight given to its conclusions and recommendations as a product acceptable to all countries represented, be they refugee-generating or refugee-receiving countries.

The rigour of the *de facto* consensus rule was moderated somewhat by two factors. First, a consensus was pre-ordained by prior consensus. Thus, no member could repudiate obligations already assumed by his government, particularly those stipulated in the Charter of the UN, the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States according to the Charter of the UN, and the 'mother resolution' (36/148) that created the Group.⁶⁸ As noted in section II above, the Group already

⁶⁵ U.N. Doc. A/40/385 (1985), Annex, para. 8 (d).

⁶⁶ Only in one instance was the right of an adviser to speak during the absence of a member challenged, albeit unsuccessfully.

⁶⁷ Para. 6 of the operative part of General Assembly Resolution 36/148 merely 'requests the Group of Governmental Experts to be mindful of the importance of reaching general agreement whenever that has significance for the outcome of its work'.

⁶⁸ Note should be made of the conspicuous absence of the mention of the Universal Declaration of Human Rights from the Group's conclusions and recommendations. This may be due to the lukewarm attitude toward the Declaration by the Soviet bloc, as reflected in the latter's abstention

considered the international instruments, principles and norms governing the subject of averting new massive flows of refugees as adequate. The task before the Group was not to add new principles or norms, but to identify those which were relevant. Accordingly, so long as the Group's report stuck to the principles and norms contained in the above-mentioned instruments, no member could object to their inclusion in the report except on grounds of irrelevance. However, the question of relevance or irrelevance is a matter which must be decided on the basis of reason and logic, and not arbitrariness. Here the official role of members of the Group as 'experts' inclined them more to the reasoning process than if they were governmental representatives. It suffices to cite an example of how the application of such a process enabled the Group to reach agreement on an important part of its recommendations.

Notwithstanding the fact that the General Assembly in Resolution 36/148 specifically requested the Group to give 'due regard' to the twin rights of voluntary repatriation and adequate compensation in formulating its recommendations,⁶⁹ there was strong opposition to their inclusion by refugee-generating countries. It was argued that since these rights addressed the *post*-, rather than *pre*-flow phenomenon, and since the Group's mandate was to avert *new*, rather than *past*, flows of refugees, these rights would lie outside the Group's purview. The counter-argument was made, however, that a clear enunciation and recognition of the 'obligation' of States to comply with these rights would discourage a potential refugee-generating country from expelling its own citizens, for whatever temporary gains might result from such expulsion would be nullified subsequently by their voluntary repatriation and appropriate compensation. Accordingly, why not improve the political, social and economic conditions of all groups of the population at home in the first place, instead of forcing some of them directly or indirectly to leave their country? In this sense, the rights of voluntary repatriation and adequate compensation would surely serve the purpose of averting new massive flows of refugees; hence, they were 'relevant' indeed. The logic of this counter-argument being impeccable, the Group agreed to adopt the twin rights of voluntary repatriation and adequate compensation in its recommendations.

Secondly, lurking behind each serious deadlock was the realization that failure to reach consensus might result in referral to the General Assembly, where the unanimity rule does not exist⁷⁰ and whose composition is not biased in favour of

in the voting on that Declaration in 1948. The Soviet bloc subsequently affirmed the Declaration when they voted for the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960, para. 7 of which reads: 'All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration . . .': General Assembly Resolution 1514 (XV) of 14 December 1960. See also Lee, 'The Legal Status of Human Rights Re-Examined', in *Population and Development: Hearings Before the House Select Committee on Population*, 59th Congress, 2nd Session (1978), vol. 1, pp. 671, 701 n. 19.

Ironically, para. 7 of the Preamble to the 'mother resolution' (36/148) reaffirms the 'inviolability of the provisions of the Charter of the United Nations and the Universal Declaration of Human Rights and other existing international instruments, norms and principles relevant, *inter alia*, to responsibilities of States with regard to averting new massive flows of refugees, as well as to the status and the protection of refugees . . .'. Thus the relevance of the Declaration to the Group's conclusions and recommendations is implicit.

⁶⁹ See para. 5 of the operative part of the resolution referring to para. 3.

⁷⁰ The same kind of indirect or subtle pressure was inherently present in the Special Committee

refugee-generating States—just the opposite of what obtained in the Group. From the standpoint of a refugee-generating State, then, why risk a lopsided vote in the General Assembly on terms less favourable to it if a compromise could be struck within the Group? For the above reasons, the consensus rule was in reality subject to limitations against gross abuse. Its contributions to the working of the Group far outweighed its negative qualities.⁷¹

(d) *Chairmanship*

The Chairman of the Group, Koffi Adjoyi of Togo, occupied a pivotal position through his judicious ruling on procedural matters and setting of the pace for the work. He was also personally and physically indispensable as the incumbent of a one-man 'bureau' of the Group.⁷² The fact that he came from a francophone African country that receives and generates very few refugees, if any, served to enhance his acceptability and authority. In short, he was a welcome choice as the chairman—a factor that contributed significantly to the success of the Group.

A mechanism that the chairman used with considerable adroitness in resolving deadlocks was his appointment of 'Drafting Committees'. Unlike their counterparts in the International Law Commission and the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, for example, whose memberships and numbers were fixed and which met regularly and engaged in essentially 'drafting' matters,⁷³ the 'Drafting Committees' of the Group varied in size and composition and met as the occasion warranted. Their membership frequently consisted of two directly opposing parties to a dispute, with or without an equal number of their respective allies or 'neutrals', whose position on the issue in dispute had not been marked by rigidity. These committees usually met outside of the formal meetings. Occasionally, when an issue of vital importance was involved, as, for example, over the question whether the Group's recommendations should be stated in general or more particularized terms, formal meetings would be suspended to allow the 'Drafting Committee' to seek a consensus. It would be difficult to exaggerate the usefulness of such a body to the successful outcome of the Group.

on Principles of International Law concerning Friendly Relations and Co-operation among States. See Lee, loc. cit. above (p. 327 n. 64), at p. 1307.

⁷¹ According to Jenks, consensus represents a new compromise between ease and responsibility of action and has attracted an increasing measure of attention as the most appropriate basis for important decisions. Indeed, he pointed out: 'Historically, international law owes much to the concept of a general consensus; customary international law has grown out of, and developed by means of, such a consensus; the old diplomacy, which we tend to think of as operating on the principle of unanimity, was at its best a collegial conduct of affairs by consensus.' After citing the consensus rule adopted by the UN Advisory Committee on the Peaceful Uses of Atomic Energies and others, Jenks concluded: 'A wider acceptance of the principle of consensus represents the only realistic approach to many of our difficulties'; see Jenks, 'Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decisions in International Organisations', *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965), at pp. 48, 55, 56 and 63.

⁷² This resulted from the lack of consensus over the size and composition of the 'bureau' at the first session: see Lee, loc. cit. above (p. 317 n. 2), at p. 482. At the second session, the Group agreed that the Chairman would carry out the functions of Rapporteur: see UN Doc. A/38/273 (1983), Annex, para. 12.

⁷³ For a comparison of the Drafting Committee of the International Law Commission with that of the Special Committee, see Lee, loc. cit. above (p. 327 n. 63), at pp. 560-1.

V. ASSESSMENT AND CONCLUSIONS

The following assessment of the Group's impact on future refugee flows may be made by way of a conclusion.

(a) '*Recommendations*' v. '*Obligations*'

The recommendations adopted by the Group belong to two distinct categories: Paragraph 66 sets forth a series of 'obligations' which member States were called upon to respect for the purpose of averting new massive flows of refugees; the rest of the subsection belongs to 'recommendations', properly so called. By using the term 'obligations' (even though the entire paragraph 66 is under the subsection labelled 'recommendations'), the Group was in effect engaged in the progressive development of international law and its codification, which the General Assembly is empowered to initiate through its organs under Article 13 (1) (a) of the Charter of the UN. In this respect, the Group performed functions akin to those undertaken by the International Law Commission and the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN.

Since 'rights' and 'obligations' are two sides of the same coin, paragraph 66 of the report constitutes in essence a catalogue of 'Rights and Duties of States to Avert New Massive Flows of Refugees'. Widespread dissemination of this catalogue would no doubt reinforce the legal effects of the Group's codification work mentioned above.

(b) '*Non-intervention*' v. '*State Responsibility*'

Permeating the proceedings of the Group was the tension between non-intervention and State responsibility as the guiding principle to avert new massive flows of refugees, reflecting the perspective of refugee-generating and refugee-receiving States, respectively. In the end, the Group came down in favour of State responsibility by stating in its conclusions:

The analysis of causes and factors showed that the emergence of massive flows of refugees is a result of a number of complex and often interrelated political, economic and social problems related to, and influenced by, the overall international situation. It may affect the political and social stability, as well as the economic development, of the receiving States, and also carry adverse consequences for the economies of the countries of origin and entire regions, thus endangering international peace and security. Moreover, in view of its complex nature and magnitude, as well as its potentially destabilizing effects, averting massive flows of refugees is a matter of serious concern to the international community as a whole. In the first instance, dealing with this problem is the responsibility of the States directly concerned. Given the character of the problem, the task of averting massive flows of refugees requires improved international co-operation at all levels, in particular in the framework of the United Nations, in full observance of the principle of non-intervention in the internal affairs of sovereign States.⁷⁴

The Group thus characterizes massive refugee flows as capable of 'endangering international peace and security', the prevention of which is 'a matter of serious concern to the international community as a whole'. If an act generating refugee

⁷⁴ UN Doc. A/41/324 (13 May 1986), para. 63.

flows indeed endangers 'international peace and security', it is a violation of the Charter of the UN;⁷⁵ hence, by definition, an 'internationally wrongful act'⁷⁶ entailing the international responsibility of the State concerned.⁷⁷ Accordingly, individual and collective responses thereto⁷⁸ would not, under the circumstances, constitute an intervention in the internal affairs of that State. The Group's conclusions thus settle, once and for all, the oft-heard argument that the generation of refugees or mass expulsion of citizens is an internal affair, brooking no outside interference.

(c) *The Role of Non-Governmental Organizations*

By their nature, the recommendations of the Group are brief and succinct. They must be elaborated upon if they are to serve as practical guides and standards for States and international organs. What does, for example, voluntary repatriation entail for the countries of origin and asylum, as well as for such public and private international organizations as the UNHCR, ICM⁷⁹ and ICRC?⁸⁰ Are there preconditions and safeguards against reprisals? Who determines the voluntariness of repatriation, pays the costs and monitors post-repatriation developments? What mechanisms or channels should be used? What would be the sanctions, if any, against States for non-compliance with their 'obligations'?⁸¹ Similar questions need to be addressed

⁷⁵ In particular, Article 1 and Chapter VII.

⁷⁶ Article 19 (1) of the Draft Articles on State Responsibility, Part I, adopted on first reading by the International Law Commission, provides: 'An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached': *Yearbook of the International Law Commission*, 1980, vol. 2, pt. 2, pp. 30-5; UN Doc. A/CN.4/SER.A/1980/Add. 1.

⁷⁷ Article 1 of the Draft Articles on State Responsibility provides: 'Every internationally wrongful act of a State entails the international responsibility of that State': *ibid.* For commentary on this article, see Second Report on State Responsibility by Roberto Ago, Special Rapporteur, *ibid.* 1970, vol. 2, pp. 179-87; UN Doc. A/CN.4/SER.A/1970/Add. 1.

⁷⁸ See Articles 9 and 14 of the Fifth Report on the Content, Forms and Degrees of State Responsibility (Part II of the Draft Articles), by Special Rapporteur Willem Riphagen, UN Doc. A/CN.4/380 and Corr. (1984), authorizing reprisals against States committing internationally wrongful acts. See also Lee, 'The Right to Compensation: Refugees and Countries of Asylum', *American Journal of International Law*, 80 (1986), pp. 532, 559-60, 563-4.

⁷⁹ The Intergovernmental Committee for Migration was established in 1951 to arrange resettlement processing and transportation for refugees and migrants. It conducts programmes for medical screening, language training and cultural orientation. It also sponsors the 'return of talent programmes' to relocate expatriate professionals and skilled workers in their countries of origin.

⁸⁰ The International Committee of the Red Cross was originally founded in 1863 to protect and assist the victims of armed conflicts. It is a private and independent institution entrusted by the Geneva Conventions with the task of visiting prisoners of war and civilian internees and performing humanitarian tasks and services, including the tracing and medical services, and material assistance, in cases of conflicts, internal tension and unrest. See ICRC, *Annual Report*, 1984.

⁸¹ The following statement of Singapore's representative, Mr Teo, before the Special Political Committee of the General Assembly called attention to the need for 'sanctions':

'The basic question was why certain countries should have to pay the cost of the irresponsible policies of other countries, particularly in those cases in which such policies were aimed at achieving certain political and military objectives and were perpetuated by an act of armed intervention. That was what had happened between 1979 and 1982 in the ASEAN countries, particularly in Singapore, which had had to face an influx of tens of thousands of 'boat people' deliberately provoked by the policy of domination of the Vietnamese authorities, who were well aware that such a sudden and heavy burden would serve to destabilize the region.

'The recommendations of the Group of Governmental Experts were inadequate because they did

to mass expulsion,⁸² adequate compensation,⁸³ and regional and subregional co-operation.⁸⁴

In pondering these questions, one cannot but regret a serious omission from the Group's recommendations: the role of non-governmental organizations. Certainly 'international cooperation to avert new flows of refugees' should include co-operation on both governmental and non-governmental levels. Here, universities,⁸⁵ as well as research, professional and humanitarian

not go to the heart of the problem. If its root causes were to be tackled in an effective manner, there must be a firm resolve to increase the political and economic cost to those countries which were directly responsible by forcing them . . . through the imposition of appropriate sanctions, to comply with the resolutions of the United Nations and the will of the international community.'

(*General Assembly Official Records*, 40th Session, Special Political Committee, 10th meeting, 15 October 1985, Summary Record, UN Doc. A/SPC/40/SR.10, p. 12.)

⁸² See Coles, 'The Problem of Mass Expulsion' (a background paper prepared for the Working Group of Experts on the Problem of Mass Expulsion convened by the International Institute of Humanitarian Law, San Remo, Italy, 16-18 April 1983); Lee, 'Draft Declaration: Principles of International Law on Mass Expulsion', *Proceedings of the 78th Annual Meeting of the American Society of International Law*, 1984 (1986), at pp. 344-6. See also text accompanying n. 88 at p. 334, below.

⁸³ See Lee, 'The Right to Compensation: Refugees and Countries of Asylum', *American Journal of International Law*, 80 (1986), p. 532.

⁸⁴ Kimminich, 'Regional System for the Protection and Assistance of Refugees: Europe' (a background paper prepared for the International Committee on the Legal Status of Refugees, the International Law Commission, 1984); Muntarhorn, 'Regional System for the Protection and Assistance of Refugees: South-East Asia' (a background paper prepared for the International Committee on the Legal Status of Refugees, the International Law Commission, 1984); Saxena, 'Regional System for the Protection and Assistance of Refugees: South Asia' (a background paper for the International Committee on the Legal Status of Refugees, the International Law Commission, under preparation).

⁸⁵ A project at the University of Juba in southern Sudan may point to the way of how universities may be involved in averting new flows of refugees. A centre for refugee studies was established at the University in 1985, funded largely by the Ford Foundation, but also with British support. The centre has two mutually reinforcing themes:

(a) a series of multidisciplinary courses, seminars, conferences and research activities oriented toward a creative solution of the problems of refugees and famine victims;

(b) a means of providing a common theme of orientation which, after full discussion, provides a theme for integrating the interests and activities of faculty and students from all the University of Juba's constituent colleges.

Among the academic issues to be dealt with by the centre are:

(a) root causes of refugee and famine phenomena;

(b) administration and management of displaced persons;

(c) problems of refugees such as health, food, education, repatriation and resettlement; and

(d) solutions to the problems of refugees such as resource management, rural development, education and international law.

Two similar projects are in varying stages of planning at the Universities of Khartoum and the Philippines. In addition to the academic features described above, the faculty and students would be given opportunities to assist refugees, during holidays and after-school hours, in their respective fields, e.g. education and languages, nutrition, hygiene, dental and medical care, vocational training, horticulture and agriculture. These activities would provide students with opportunities for on-the-job training and extra income, as well as public service. At the same time, they would fill the needs of refugees and prepare them for self-sufficiency. The mere presence in refugee camps of faculty and students—more idealistically motivated—might have an ameliorating effect on the harsh condition and environment. In addition, why could not the medical and nursing students of the University of the Philippines, e.g., provide appropriate health care for refugees under the supervision of their professors at the Philippine Refugee Processing Center in Bataan, instead of having to rely on high-cost foreign doctors and nurses?

An important by-product through the infusions of foreign funds and enrichment of academic

institutions,⁸⁶ whether supported by public or private funds, can play a useful role. It suffices to give an example of what a non-governmental organization is actually doing to contribute to international co-operation to avert new massive flows of refugees.

Founded in 1873 and headquartered in London, the International Law Association has forty national branches. Its members are lawyers who participate in Association activities in their individual capacities. The Association has been engaged in, *inter alia*, preparing draft conventions and elaborating rules or principles of international law in such areas as State immunity, international commercial arbitration, the law of the sea and enforcement of foreign judgments, mainly through its International Committees.⁸⁷

Responding to the challenge of refugee crises throughout the world, the Association decided to establish an International Committee on the Legal Status of Refugees in 1983. The Committee prepared a Draft Declaration of Principles of International Law on Mass Expulsion, which was adopted by the Association as basis for a UN declaration or convention.⁸⁸ Similar projects are planned in the fields of voluntary repatriation, the right to compensation of refugees and countries of asylum, and regional and subregional co-operation for averting, protecting and assisting refugees. In connection with the latter, the Committee is co-sponsoring with the Inter-American Institute of Human Rights in San José, Costa Rica, a project on the regional system in Latin America during the coming year. All of these activities will no doubt help implement the Group's recommendations. But more input from other non-governmental organizations is needed and should be encouraged.

(d) *The Role of the Secretary-General*

It may be recalled that a proposed designation of a 'special representative of the Secretary-General on international co-operation to avert new massive flows of refugees'⁸⁹ gave way to a modified role of the Secretary-General. The original proposal was defeated because of strong opposition by refugee-generating countries on the ground that the early warning system and its monitoring functions, etc., could serve as a subterfuge for institutionalized espionage, as well as constitute an interference in the internal affairs of States. There was also a legitimate

programmes could be the upgrading of the quality of universities in the developing countries. By utilizing the 'return of talents programmes' in the instructional and servicing activities, the universities could also help reverse the trend toward 'brain drains'.

⁸⁶ Mention should be made of the International Institute of Humanitarian Law, based in San Remo, Italy. In addition to co-sponsoring a series of Refugee Law Courses with the UNHCR, the Institute has organized projects and workshops in such areas as mass expulsion, the movements of people, root causes of refugees, pre-flow aspects of the refugee phenomenon, and voluntary repatriation.

The Refugee Policy Group is a private organization based in Washington, DC. Among its projects is "'Early-Warning": An Analysis of Approaches to Improving the International Response to Refugee Crises' (May 1983). It co-operates with the Independent Commission on International Humanitarian Issues in Geneva on another study of the early warning system.

⁸⁷ See General Information Summary issued by the International Law Association, as well as the Association's biennial reports.

⁸⁸ See the Resolution on the Legal Status of Refugees adopted by the Association by consensus on 30 August 1986. The texts of the Resolution and the Declaration will appear in the Association's *Report of the Sixty-Second Conference*, Seoul, 1986.

⁸⁹ Loc. cit. above (p. 322 n. 40).

management concern: the Secretary-General should be given sufficient flexibility and not be straitjacketed in the discharge of his administrative duties. For example, the Secretary-General might conceivably want to appoint a task force that would report directly to him, rather than to his 'special representative', in a given refugee situation, but would prefer to use a different mechanism or channel in a different refugee setting. In the end, the Secretary-General was given the following tasks under the Group's recommendations:

With a view to improving international co-operation for the prevention of new massive flows of refugees, the General Assembly should encourage the Secretary-General to make full use of his competences. To this effect, he should, in particular, in accordance with the Charter of the United Nations, as well as the relevant mandates of the competent United Nations organs:

- (a) Give continuing attention to the question of averting new massive flows of refugees,
- (b) Ensure that timely and fuller information relevant to the matter is available within the Secretariat,
- (c) Improve co-ordination within the Secretariat for analysing the information, so as to obtain an early assessment on the situations which might give rise to new massive flows of refugees and to make the necessary information available to the competent United Nations organs in consultation with the States directly concerned,
- (d) Help improve the co-ordination, within the Secretariat, of the efforts of United Nations organs and specialized agencies and of Member States concerned for timely and more effective action,
- (e) Consider taking such measures as are necessary for the purposes enumerated in this paragraph.⁹⁰

Of special interest is the proposed role of the Secretary-General under subparagraph (d) to 'help improve the co-ordination . . . of the efforts . . . of Member States concerned . . .'. Depending on how this task is implemented, such a role for the Secretary-General over the efforts of member States may be unique in the annals of the UN.

In the exercise of all the above functions, however, the Secretary-General would be subject to the following financial and personnel constraints:

[H]e should bear in mind the ongoing efforts to improve the efficiency of the administrative and financial functioning of the United Nations and, without prejudice to his administrative competence and functions, should refrain from creating new divisions or posts for this purpose.⁹¹

These constraints must be seen as major gains for refugee-generating States. Notwithstanding, in order to assure effective implementation of the Group's recommendations, the Secretary-General should entrust the tasks of the originally proposed 'special representative' to an existing 'Under-Secretary-General' or 'Assistant-Secretary-General' as an added responsibility, so long as these tasks could be performed within the existing 'limits of financial and personnel resources available to the Secretariat'.

As a final observation, there is a great deal of similarity between the Group and the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States—from their substantive work in clarifying international law and promoting international co-operation in their

⁹⁰ UN Doc. A/41/324 (13 May 1986), para. 70.

⁹¹ *Ibid.*, para. 71.

respective fields, to procedural matters relating to consensus, equitable geographical representation and even the size of membership.⁹² How history will judge the Group's role in averting new massive flows of refugees in comparison with that of the Special Committee in promoting friendly relations and co-operation among States remains to be seen. There is no doubt, however, that effective implementation of the Group's recommendations will bring us closer to a world without refugees.

⁹² As compared to twenty-five members in the Group, the Special Committee had twenty-seven members appointed by the President of the General Assembly. See Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, prepared by Rapporteur Hans Blix, UN Doc. A/5746 (1964), at p. 9. See also Lee, *loc. cit.* above (p. 327 n. 64), at p. 1297.

ABANDONMENT OF TERRITORIAL CLAIMS: THE CASES OF BOUVET AND SPRATLY ISLANDS*

By GEOFFREY MARSTON¹

THE United Kingdom has been a party to many territorial disputes in various parts of the world, which, because they were conducted substantially by diplomatic note and dispatch, and by departmental minute, have remained largely concealed in archival papers. In some of these disputes, nevertheless, one or another of the parties contemplated the use of third party settlement. One such case, resolved by conciliation, was described in an earlier *Year Book*.² The aim of the present note is to describe two other disputes in which the UK was involved, the first over Bouvet Island in the sub-Antarctic waters of the South Atlantic, the second over Spratly Island and Amboyna Cay in the South China Sea.

I. BOUVET ISLAND

(a) *The Whaling Licence*

By a letter dated 9 February 1927,³ Johan Rasmussen & Co. of Sandefjord, Norway, asked the Colonial Office for a licence to catch whales 'at Bouvet Island and adjacent waters' for a period of ten years. The Colonial Office consulted the Admiralty and the Foreign Office. In a letter to the Admiralty of 6 April 1927, the Foreign Office stated that 'no reference had been found to the ownership of the island, which was discovered in 1739 by Captain Bouvet of the French Merchant Marine'. It went on:

The question whether there is any objection to the issue of the desired licence appears to depend firstly on the exact position of the island, i.e. whether it is outside those spheres of the Antarctic to which the Imperial Conference in 1926 regarded a British title as having been established, and secondly on the precise nature of the alleged French title to the island.³

The Admiralty accompanied its reply to the Colonial Office of 30 April 1927 with a memorandum.⁴ In respect of Bouvet Island, the location of which it gave as latitude 54° 26' South, longitude 3° 24' East, the Admiralty stated therein that '[b]y the right of prior discovery, Bouvet I. is unquestionably French', having been sighted, but not landed upon, by Captain Bouvet in January 1739. It went on, however, to assert that 'formal possession' of the island had been taken only once, on 16 December 1825, when Captain George Norris, of the

* © Dr Geoffrey Marston, 1987.

¹ LL M, Ph.D. (Lond.); Lecturer in Law, University of Cambridge; Fellow of Sidney Sussex College.

² 'The Anglo-Brazilian Dispute over the Island of Trindade, 1895-6', this *Year Book*, 54 (1983), pp. 222-39.

³ CO 78/175/8. All archival references in this paper are to documents held in the Public Record Office, London.

⁴ FO 371/12645, ff. 222-8.

sealer *Sprightly*, hoisted the British flag on it and took possession in the name of King George IV. A contemporary extract from the sealer's log, the original of which had been later lost, was attached to the memorandum. This described how Norris had landed on an island named by him 'Liverpool Island'.

The Admiralty memorandum also mentioned 'Thompson Island', first discovered by Captain Norris on the same voyage although he did not land on it; since that time, it had been sighted only once and no formal possession had ever been taken of it. After pointing out that the two islands formed the most isolated group in the world—'in fact, the only one around which a circle of 1,000 nautical miles radius can be drawn which includes no other land whatever'—the memorandum considered that the islands ought to be incorporated in the British Antarctic Dependencies as 'the only known portions of the Antarctic or sub-Antarctic territory whose ownership is still, to some extent, an open question', although lacking any practical naval or commercial importance whatever. The Admiralty speculated that if a British claim were contested it would probably be by France which had recently, by a decree of 21 November 1924, brought within the government of the French territory of Madagascar the St Paul and Amsterdam Islands, the Kerguelen and Crozet Archipelagoes, and Adélie Land on the Antarctic mainland.

In its covering letter to the Colonial Office, the Admiralty stated that whereas it saw no objection to the issue of a whaling licence to the Norwegian firm, 'owing to the uncertainty attaching to the position of Thompson Island, and its proximity to Bouvet Island, it might conveniently be made a condition of the licence that Messrs Rasmussen should endeavour to locate the former and to take steps to assert, on the spot, this country's ownership of it if no objection is seen to this procedure'.⁵

Within the Foreign Office, R. H. Campbell minuted on 4 May 1927 that the Admiralty's last suggestion was 'quite preposterous' as it 'would be in flagrant conflict with the implied presumption of our right to issue a licence'.⁶ Minuting the next day that Campbell's reaction was unnecessarily emphatic, the Foreign Office Legal Adviser, Sir Cecil Hurst, considered that '[i]f a foreigner is content to accept a licence in agreed terms from a government, there is no inherent unreasonableness in the licence providing for his rendering certain services to that government'.⁶ Hurst thought, however, that a proposal such as that advanced by the Admiralty would be likely to prejudice the British claim in the eyes of a tribunal; a better suggestion would be for the licensee to communicate the exact location of Thompson Island which would then be the subject of any necessary steps on the part of the British Government to secure formal possession. The Foreign Office advised the Colonial Office accordingly⁷ and this advice was concurred in by the Admiralty.⁸

By a letter dated 30 November 1927,⁹ the Admiralty then brought to the attention of the Foreign Office the fact that a Norwegian scientific expedition was about to sail from Cape Town for Antarctica and suggested that any measures which it might be possible to take to safeguard British territorial rights should be adopted without delay. In view, however, of the news that the expedition had been instructed to 'take possession' of any land not regarded as belonging to any other power, the Foreign Office suggested to the Dominions

⁵ FO 371/12645, ff. 220-1.

⁶ *Ibid.*, f. 218.

⁷ *Ibid.*, ff. 232-3.

⁸ CO 78/175/8.

⁹ FO 12646, ff. 65-6v.

Office that the claims of the British Government as set out in section XI of the published proceedings of the Imperial Conference of 1926¹⁰ might be brought to the attention of the Norwegian Government as this would 'place His Majesty's Government in a stronger position in the event of any subsequent dispute as to the British title to any of the areas in question'.¹¹

By a press release dated 18 January 1928, the Colonial Office announced that it had granted an exclusive licence to Rasmussen & Co. to occupy Bouvet and Thompson Islands for whaling and guano exploitation.¹² The licence, dated 22 January 1928 and signed by the Secretary of State for the Colonies, was not sent to the Norwegian company until 27 February 1928.¹³ It was to take effect on 1 June 1928.

(b) *The Norwegian Occupation*

On 19 January 1928, the Norwegian Minister in London, B. Vogt, sent a note to the Secretary of State for Foreign Affairs, Sir Austen Chamberlain, informing him that news had been received in Oslo from the Norwegian expedition that 'Bouvet Island had been occupied on the 1st December, 1927, a depot has been placed there, and the Norwegian flag has been hoisted on the island'.¹⁴

The British Minister in Oslo, Sir Francis Lindley, reported to the Foreign Office in a dispatch dated 20 January 1928¹⁵ that in the words of the Permanent Head of the Norwegian Ministry for Foreign Affairs the occupation had taken place in a manner entirely defensible according to international law, since Bouvet Island was a no-man's land and the grant of a concession by the Colonial Office must have been due to a misunderstanding. Furthermore, the island lay outside the area of Antarctica claimed by Britain.

Within the Colonial Office, Sir G. Grindle minuted on 24 January 1928 as follows:

Our case will be that formal possession was taken of this island in the name of the King in 1825. On the other hand it does not appear that there was any contemporary ratification of his act. But the doctrine that ratification must follow was not I think invented at that time.

The other form of confirmation is the performance of acts of sovereignty—such for instance as we performed when we gave the Governor of the Falklands jurisdiction over Graham's Land.

The only act of sovereignty which can conveniently be performed over these uninhabited and inaccessible islands is to let them to an applicant, when one appears. It is in this way that we have acquired our title to several of these isolated islands, and there is a stock draft for the purpose, the present form of which was worked out in the C[olonial] O[ffice] some 20 years ago. It is unfortunate that our applicant did not appear a little earlier, as we should then have undoubtedly forestalled the Norwegians. As it is, I imagine that we have a very good point in that we were negotiating about a lease months before

¹⁰ Cmd. 2768, p. 33. Under the heading 'British Policy in the Antarctic', this stated: 'There are certain areas in these regions to which a British title already exists by virtue of discovery.' The areas listed, however, did not specifically include Bouvet Island.

¹¹ FO 12646, ff. 80-1.

¹² CO 78/175/8.

¹³ CO 78/175/13. A provision in the licence read as follows: 'The licensees will endeavour to locate the exact position of the island called Thompson Island situated to the North East of Bouvet Island and will within a reasonable time from the date of this Licence communicate details of its latitude and longitude to the Secretary of State.'

¹⁴ FO 371/13358, ff. 243-4.

¹⁵ Ibid., ff. 249-54.

the Norwegian expedition started—i.e. exercising sovereign rights in confirmation of the century old annexation. And it would have been more in accordance with international courtesy if the Norwegians had made inquiries before despatching an expedition to pick up local islands. Other powers have done so. All this I think amply justifies our action. Whether an arbitrator would decide in our favour if there were an arbitration, and whether the F[oreign] O[ffice] will not perform a graceful concession, are other questions. If they do, our case is at least sufficient to make the concession a real one and get something for it in the shape of international agreement about whaling.¹⁶

(c) *The Parties take up Positions*

On 31 January 1928 an interdepartmental meeting was held at the Foreign Office.¹⁷ Representatives of the Foreign Office, the Admiralty, the Colonial Office and the Dominions Office attended. The Foreign Office representation contained two members of its legal staff, Hurst and Malkin. In a minute dated 27 February 1928, R. H. Campbell, who had been present, described the discussion in part as follows:

It was generally recognised, firstly that possession of the island was worth nothing to us apart from its value as a whaling centre, and secondly that our claim to it is none too strong in view of the fact that we have done virtually nothing to perfect our title since Captain Norris took possession of it a hundred years ago. On the other hand, the committee had to take into consideration the effect which our attitude might have on our claims elsewhere, notably in the Antarctic, in respect of which some of our recent proceedings are open to challenge. Whilst, therefore, the committee was opposed to what Sir C. Hurst styled a 'policy of scuttle', as being likely to encourage Norwegian resistance to our claims in other areas, they nevertheless envisaged the possibility of an eventual compromise if a suitable one should present itself. In all the circumstances, they reached the conclusion that the best course would be to answer the Norwegian announcement by a note . . . simply reciting the existence of our prior claim and reserving our rights in connexion therewith.¹⁸

A dispatch in these terms was sent by the Foreign Office to Sir Francis Lindley in Oslo on 9 February 1928. Its motive was stated to be 'merely the desire to avoid the risk of complications arising as a result of any acts which may be performed by the expedition in ignorance of the existence of a British title to the areas referred to in the Imperial Conference report'.¹⁹ By a note dated 15 February 1928²⁰ to Vogt in London, formally reserving all British rights in connection with Bouvet Island, Sir Austen Chamberlain reminded him that the taking of possession of the island by Norris had been published in Ross's book²¹ and in editions of the *Africa Pilot* published by the Admiralty in 1901 and 1910. He also reminded Vogt of the negotiations with the Norwegian whaling firm for a licence to operate in and around the two islands. In reply to a question in the House of Commons, Chamberlain announced on 20 February 1928 that Her Majesty's Government had formally reserved all its rights in connection with Bouvet Island. As for Thompson Island, '. . . there does not appear to be any ground for questioning its existence, although there is some degree of uncertainty regarding its position'.²² Vogt called on Chamberlain again on 28 February 1928

¹⁶ CO 78/179/9.

¹⁸ Ibid., ff. 139-40.

¹⁹ Ibid., f. 73.

¹⁷ FO 371/13359, ff. 36-50.

²⁰ Ibid., f. 82.

²¹ Sir James Ross, *A Voyage of Discovery and Research in the Southern and Antarctic Region* (1847), vol. 2, pp. 371-3.

²² Hansard, *House of Commons Debates*, 5th series, vol. 213, col. 1222.

to state that his Legation's investigations indicated that it was Thompson Island, and not Bouvet Island, which Norris had purported to annex.²³

By a dispatch of 12 March 1928,²⁴ Lindley reported that Vogt, then in Oslo, had called to assure him that the Norwegian Government had no knowledge of any previous British annexation when it sanctioned the hoisting of the Norwegian flag on Bouvet Island. Vogt had stated that he was not in favour of trying to settle the dispute through the 'machinery of arbitration' at The Hague or through the League of Nations and had been speculating on the possibility of using the services of some independent jurist; he had considered that there was a practical objection to Norway's giving up its claim on the basis that it had acted in ignorance of the facts, since some twenty years previously Captain Sverdrup had hoisted the Norwegian flag on islands north of Canada but this claim had not been recognized by the Canadian Government, presumably on the ground that Norway had not utilized the islands. Vogt had concluded that '[i]f the Norwegian Government were to give up their claim to Captain Sverdrup's discoveries, which had only been made twenty years ago, on the ground that they had not been utilised since the Norwegian flag was hoisted, it was difficult for them to act in precisely the opposite manner in the Antarctic and admit a claim on the plea of prior discovery when more than a hundred years had passed without that discovery being put to any practical use'.²⁵ To this, Lindley had replied that there was a relevant difference between an isolated island and islands off the coast of a mainland.

In a further meeting between Chamberlain and Vogt in London, held on 27 March 1928,²⁶ Vogt asserted that at the time of the Norwegian action on Bouvet Island, his Government had not known that a Norwegian whaling company was carrying on negotiations for a licence with the British Government, especially as in April 1927 the Norwegian Foreign Ministry had advised the local whaling association that Bouvet Island was among the territories in the Antarctic which could not be seen to have been occupied by any foreign State. He again stressed the analogous situation of the Sverdrup Islands.

By a note dated 23 April 1928,²⁷ Vogt transmitted to Chamberlain his Government's position that 'the Norwegian title to the island is securely founded in international law'. Having asserted that it was Thompson Island, and not Bouvet Island, on which Norris landed, the note continued:

... even if it were established that Captain Norris in 1825 took possession of Liverpool Island (Bouvet Island) for Great Britain, this cannot be considered as conveying a valid British title to the island. It is a universally recognised maxim of international law, acknowledged also at the time of Captain Norris's landing more than a hundred years ago, that a state in order to acquire sovereignty over unoccupied territory must in fact take possession of such territory, and that the possession must be effective, a purely formal act not being sufficient.²⁸

Furthermore, there was no evidence that Norris's action, that of an uncommissioned merchant ship, had been confirmed or ratified by the British Government, a requirement stressed throughout the years by that Government itself;²⁹

²³ FO 371/13359, f. 130.

²⁵ *Ibid.*, f. 182^v.

²⁷ *Ibid.*, ff. 216-27.

²⁴ *Ibid.*, f. 182.

²⁶ *Ibid.*, f. 195.

²⁸ *Ibid.*, ff. 220-1.

²⁹ Vogt relied in particular on Britain's refusal to accept that an uncommissioned person could have acquired a prior title for the US over the Oregon Territory.

nor had the British Government made the annexation known. Vogt then wrote:

My Government are strongly of the opinion that even if the act performed by Captain Norris in 1825 had given Great Britain an inchoate title to the island, this title would have become invalid owing to the fact that Great Britain, as above shown, allowed a period of about a hundred years to pass before manifesting that they considered such title to exist. . . . Prominent British writers on international law agree that an inchoate title cannot for an indefinite time constitute a bar to the occupation by another state.³⁰

In conclusion, Vogt pointed out that the master of the expeditionary ship had been duly authorized by the Norwegian Government to take unoccupied lands in possession, and that the subsequent occupation of the island had been formally ratified by a Norwegian Royal Decree which had empowered the Ministry of Justice to establish a police authority for the island.

Within the Foreign Office, the Norwegian note was first minuted upon by Hurst on 1 May 1928. After pointing out that Bouvet Island was not in the Antarctic and so was not within the territories discussed at the Imperial Conference in 1926, he went on:

Assuming that the Norwegians can establish the allegations of fact contained in this note, my feeling is that if the British title to Bouvet Island were submitted to an international tribunal, the decision would go against Great Britain. Our title is based entirely on the landing on the island by Captain Norris a century ago. There has been nothing since that date to maintain the claim to exercise control over the island. Very little even has been done to bring home to the world at large the fact that this island is claimed to be part of the British Empire. Beyond discovery and the taking of possession a century ago, none of the elements that go to constitute a valid title to the island are present. . . . the difficulty of effecting permanent settlement does not exclude the necessity of doing something to maintain the title. There should at least be some facts which can be pointed to to show that those who trespass on or occupy the island will sooner or later come into conflict with the authorities who claim that they have a good title to the island.³¹

Hurst pointed out that an adverse decision by an international tribunal might have an inconvenient repercussion on British claims to territory in Antarctica, many of which 'rest on nothing more than discovery'. He went on to suggest that the British Government would gain more from an arrangement with Norway over whaling than from the doubtful outcome of an arbitration over Bouvet Island. Another minute on the file considered that renunciation of the British claim to Bouvet Island should see a satisfactory end to the Sverdrup Islands dispute.³²

The Foreign Office, by a letter dated 10 May 1928,³³ wrote to the Admiralty and to the Colonial Office expressing its view that it would be inexpedient for Britain to maintain its claim to the island. On 16 July 1928, an interdepartmental conference was held at which it was decided to leave the question of Bouvet Island separate from that of the Sverdrup Islands and not to bargain with Norway for a renunciation of its claim to the latter in return for Britain's renunciation of its claim to the former.³⁴

³⁰ FO 371/13359, ff. 224-5.

³² *Ibid.*, f. 214^v.

³⁴ FO 371/13360, f. 13^r.^v.

³¹ *Ibid.*, ff. 213-14.

³³ *Ibid.*, ff. 230-2.

(d) *Withdrawal of the British Claim*

Negotiations for settlement of the dispute on the basis of agreement on whaling were begun in London in October 1928 between the Foreign Office and the Norwegian Minister,³⁵ although Norway persisted in maintaining its position over the Sverdrup Islands. Finally, on 14 November 1928, a settlement was reached. In the words of a dispatch to Oslo dated 15 November 1928, Sir Ronald Lindsey, the Permanent Under-Secretary of State at the Foreign Office, had 'stat[ed] formally that His Majesty's Government withdrew all claim to Bouvet Island, and would raise no objection to its annexation by the Norwegian Government'.³⁶ In return, the Norwegian Government stated its willingness to discuss with the British Government measures to protect whales and seals in the Arctic and Antarctic regions. Furthermore, the Norwegian Government expressed its willingness to refrain from occupying any land within the territories mentioned at the Imperial Conference. A note on the file stated that it had been decided that no written notification would be made to the Norwegian Government of the withdrawal of the British claim to Bouvet Island.³⁷

On 19 November 1928, the Parliamentary Under-Secretary of State, Foreign Office, G. L. T. Locker-Lampson, stated in reply to a question:

After careful review of all the issues involved, and having regard to the friendly relations existing between the two countries, His Majesty's Government have decided to waive the British claim to Bouvet Island in favour of Norway.³⁸

One last problem which arose was the possibility that Rasmussen & Co. might seek compensation from the British Government for breach of a provision in the licence to the effect that the licensee was entitled to one year's notice of termination in the event of His Majesty's relinquishing sovereignty. At an inter-departmental meeting held on 23 November 1928 it was agreed that Sir Ronald Lindsey should tell Vogt that 'we looked to the Norwegian Government to save us from embarrassment in the event of any claim being made'.³⁹ In reply to a question in the House of Commons on 28 January 1929, the Secretary of State for Dominion Affairs, L. S. Amery, referred to the waiving of the claim to Bouvet Island and went on: 'The licensees had previously volunteered to forgo their rights under the licence.'⁴⁰ As for Thompson Island, Amery added in the above reply:

If Johan Rasmussen and Company wish to press for a continuance of the licence in respect of Thompson Island, His Majesty's Government will be entirely willing to meet them in so far as they can find the island.⁴¹

Thompson Island, however, has never been found again.

³⁵ Ibid., f. 208^{r.v}; f. 276^{r.v}.

³⁶ FO 371/13361, f. 27.

³⁷ Ibid., f. 97.

³⁸ Hansard, *House of Commons Debates*, 5th series, vol. 222, col. 1367; see also *ibid.*, vol. 223, col. 38.

³⁹ FO 371/13361, ff. 82-3.

⁴⁰ Hansard, *House of Commons Debates*, 5th series, vol. 224, col. 604.

⁴¹ Ibid., col. 605.

II. SPRATLY ISLAND AND AMBOYNA CAY⁴²(a) *The French Annexation*

On 23 April 1930 the Foreign Office received the following telegram from the British Consul-General in Saigon, French Indo-China:

French announce annexation of Spratly or Storm Island which appears to be the identical island annexed by Great Britain in 1877. Local authorities state that they acted on orders from the French Foreign Office.

Attention of local authorities has been drawn to apparent mistake verbally. Please send instructions as to further steps, if any, at Saigon.⁴³

A later dispatch, dated 23 April 1930, from the Consul-General, gave further particulars of the French claim. It appeared that France had taken possession of all islands within a quadrilateral formed by the lines of longitude 111° and 117° East and latitude 7° and 12° North.⁴⁴

In a memorandum dated 28 April 1930 the Librarian of the Foreign Office, A. F. Orchard, prepared a detailed historical account of British activity in respect of the island.⁴⁵ It was described as being situated in latitude 8° 36' North, longitude 111° 55' East, about 280 miles from the north-west coast of Borneo, and as 'a bare, flat island about 8 feet high, 2½ cables in length and 1½ cables in breadth'. Orchard's researches indicated that in September 1877 an American subject, Graham, and two British subjects, Simpson and James, went to the British Colony of Labuan with a view to seeking permission to hoist the British flag over Spratly Island and an island called Amboyna Cay, about 75 miles distant from it, having discovered that they were uninhabited and contained workable deposits of guano. The Acting Governor of Labuan and Acting Consul-General in Borneo, W. H. Treacher, accordingly signed a document which recorded the fact that the claim was registered in the Colony of Labuan, and that permission was given for the British flag to be hoisted subject to the approval of the Secretary of State for Foreign Affairs; if, however, the islands were not worked and turned to account within ten years, or if subsequently they were to be left unworked for any period of five years, the claim was to lapse. The Colonial Office then advised that as the islands lay beyond the limits of the Colony of Labuan it would be appropriate for the claim to be registered with the office of the Consul-General in Borneo. This was done and, on Treacher's request, a notice advising of the 1877 claim was published in the Government Gazettes of the Colonies of Hong Kong and the Straits Settlements. In 1888 another prospective guano exploiter, the Central Borneo Company, wished to operate on the islands and, when investigations showed that the previous licensees had abandoned their operations and that the islands were uninhabited and unoccupied, the Colonial Office, with the concurrence of the Foreign Office in 1889, proposed to grant a guano lease to that company 'in the form lately adopted'. No further correspondence was recorded.

The Admiralty gave the Foreign Office its opinion on 8 May 1930 that 'for

⁴² The spelling of the former island differs from document to document, sometimes 'Spratly', sometimes 'Spratley'. The version 'Spratly' appears in the Peace Treaty with Japan of 1951 where it is clearly used to denote a group of islands and not merely the island of that name (see below, p. 355).

⁴³ FO 371/14916, f. 407.

⁴⁴ Ibid., ff. 427-8.

⁴⁵ Ibid., ff. 408-19.

strategic reasons . . . the British claim to the Island should be upheld'.⁴⁶ By a note of 21 May 1930 addressed to the French Ministry of Foreign Affairs, the British Embassy in Paris accordingly referred to the recent purported French annexation of Spratly Island and the history as revealed by the Foreign Office research. It concluded:

The claim lodged in 1877 having thus been confirmed by formal licence by the Crown, the islands in question remain British territory unless definitely abandoned by the Crown. . . . No such abandonment has ever taken place and His Majesty's Embassy is accordingly directed to request the Ministry for Foreign Affairs to be so good as to notify the authorities in Indo-china of the fact that Spratly Island is British territory.⁴⁷

The French Ministry of Foreign Affairs replied in a note dated 13 July 1930.⁴⁸ It maintained that the French taking into possession of Spratly Island on 13 April 1930 had given a good title to sovereignty. It claimed that the registration of title in 1877 was simply an act of a private character and that in any event there was no evidence that the guano exploiters had raised the British flag on Spratly or Amboyna Islands or that they were authorized to take possession of Spratly Island for the British Crown.

Minuting upon the French note, the Second Legal Adviser to the Foreign Office, W. E. Beckett, wrote on 21 July 1930 that on the information presently before him he did not think the British claim very strong. Further information about the case was necessary. He concluded:

The statement of a claim to sovereignty acquired by occupation is always a somewhat delicate matter, requiring a good deal of consideration.⁴⁹

The Foreign Office then received a letter, dated 27 August 1930, from the Admiralty, pointing out that

. . . the importance of [Spratly] island from a Naval aspect is that it lies on the strategic route between Singapore and Hong Kong amongst a group of islands about half-way between these two places. The location of possible refuelling bases for light forces in the China Sea is at present receiving attention; and although the utility at the present time of this particular island for naval purposes may be doubtful, it is undesirable that the French should establish themselves in the area.⁵⁰

Research was continuing meanwhile on the French side and by a note dated 28 March 1931 the Ministry of Foreign Affairs sent to the British Embassy a memorandum summarizing the results. This laid great emphasis on the fact that Spratly Island had not been administratively attached to an existing British colony but had been dealt with by the Consulate-General in Borneo. It continued:

Ce fait semble bien démontrer qu'en 1877, le Gouvernement de Londres considérait l'Ile Spratly comme n'appartenant à aucun titre au domaine de l'Empire, l'enregistrement de la déclaration formulée par MM. Graham, Simpson et James par le Consulat général de Grande-Bretagne à Borneo n'ayant d'autre objet et ne pouvant avoir d'autre effet juridique international que d'établir une priorité de droit privé de propriété au bénéfice de particuliers.⁵¹

By raising the French flag on Spratly Island and attaching it administratively to the province of Cochin China the memorandum considered that French

⁴⁶ Ibid., f. 420.

⁴⁷ Ibid., ff. 424-5.

⁴⁸ Ibid., ff. 446-7.

⁴⁹ Ibid., f. 443v.

⁵⁰ Ibid., f. 464.

⁵¹ FO 371/15650, f. 341.

sovereignty extended over all islands, islets and reefs in the area lying between latitude 7° and 12° North, and west of the triangular zone reserved to United States sovereignty by Article 3 of the treaty between that country and the Philippines of 10 December 1898.⁵² In addition to Spratly Island and its immediately adjacent islets, the French claim extended to the Trident Reefs, Thi-Tu Island, Loai Ta Island, Tizard Reef, Discovery Reef, Fiery Cross Reef, London Reefs, Amboyna Cay, Rifleman Bank, Ardasier Bank and Swallow Reef.

The Colonial Office, in a letter to the Foreign Office dated 30 April 1931,⁵³ considered that for an island to be considered a British possession it was not necessary for it to be attached to some existing British colony or protectorate. In reply on 12 May 1931, however, the Foreign Office took the view that administrative attachment had some relevance to the issue of sovereignty:

... when a state claims a piece of territory which has hitherto been the property of no other state, it must, in order to create a title by occupation, give evidence of the exercise of sovereignty over it. The exercise of sovereignty means providing *inter alia* for the administration and government of the territory. This can only be done in one of two ways, (a) by attaching it for administrative purposes to some other territory, or, (b) by setting up a special administration for the new territory in question. It is sufficiently obvious that course (b) has not been followed in the case of Spratley Island and Amboyna Cay and the only question to be decided is therefore whether course (a) was adopted. The inclusion of the names of the islands in a list of British territories in the Dominions and Colonial Office List is indeed evidence of a claim to sovereignty but does not show that the claim has, in fact, been perfected by administration and occupation.⁵⁴

The Foreign Office went on to point out that the current practice in respect of territories in Antarctica was to attach them administratively to some part of the Empire so that 'there is, in fact, some British authority who is responsible for the government of that particular piece of territory'. In the view of the Foreign Office on the available evidence, no such action had ever been taken in the case of the two islands.

(b) *The Law Officers are Consulted*

The Colonial Office, in reply on 16 June 1931,⁵⁵ considered that in the light of the Foreign Office's view early action would seem to be necessary to attach to some colony or protectorate the various other miscellaneous islands claimed by Britain. Furthermore, the Colonial Office thought that in view of the importance attached to Spratly Island by both the Admiralty and the Air Ministry the opinion of the Law Officers should be sought on the matter. While agreeing that early action in respect of the other British-claimed islands was advisable, the Foreign Office considered that the Law Officers need not be troubled.⁵⁶ In a letter to the Foreign Office dated 28 July 1931, however, the Treasury expressed a wish to have a reference to them.⁵⁷ Minuting upon this letter in the Foreign Office, W. E. Beckett wrote on 24 August 1931 that steps should be taken to assemble materials for a reference to the Law Officers.⁵⁸ Accordingly the Librarian, A. F. Orchard, prepared a lengthy memorandum dated 10 September 1931⁵⁹ in which he reviewed the relevant history of the two islands, the doctrine

⁵² *Consolidated Treaty Series*, vol. 187, p. 100.

⁵⁴ *Ibid.*, f. 374.

⁵⁷ *Ibid.*, ff. 429-30.

⁵⁵ *Ibid.*, f. 383^r.v.

⁵⁸ *Ibid.*, ff. 421^v-422^r.

⁵³ FO 371/15650, f. 362.

⁵⁶ *Ibid.*, f. 399.

⁵⁹ *Ibid.*, ff. 423-8.

on acquisition of territory, the relevant jurisprudence, in particular the *Island of Palmas*⁶⁰ and *Clipperton Island*⁶¹ arbitrations, and the Law Officers' opinions of the last century in respect of the acquisition of guano islands.

The Legal Advisers to the Foreign Office then prepared a memorandum, dated 10 November 1931, entitled 'Considerations governing acquisition of territory, with reference to the question of sovereignty over Spratley Island and Amboyna Cay'.⁶² This document, drafted primarily by Beckett, considered that the authorities fell into three classes: (1) decisions of arbitral tribunals, (2) the opinions expressed in textbooks of authority, and (3) previous opinions of the Law Officers—although the last class could not be used, it was thought, in order to establish a case against the French Government.

There followed a detailed analysis of the *Island of Palmas* and *Clipperton Island* arbitrations. In conclusion on the former, the memorandum stated that 'it may be argued with some force that the various statements of the law contained in the award of Mr. Huber, which appear to be adverse [to] the case of His Majesty's Government in relation to the necessity of effective exercise of sovereignty, are directed to the case of an inhabited island, and that when this fact is taken into consideration there can be nothing in them inconsistent with the claim of His Majesty's Government in this case'.⁶³ In conclusion on the latter arbitration, the memorandum considered that its facts were 'extremely similar' to those of the present case, and would provide authority for the British claim if it could be proved that there had been a sufficiently formal annexation of Spratly Island and Amboyna Cay. The memorandum, nevertheless, expressed a note of doubt:

The award is, however, perhaps open to the criticism that there would appear to have been another alternative ground upon which the same conclusion in favour of France could have been reached, namely, that, even if France had lost the rights she acquired in 1858 by failure to take any further action, France had again asserted her claim to sovereignty in 1897 only one month before the Mexican Government took action. This claim could not have become weakened by the lapse of only one month before the arrival of the Mexican gunboat. This alternative ground is not relied upon at all in the award. If it had been made the basis of the decision, the arbitrator could have reached the same result without basing his decision upon reasoning which appears in the light of existing legal authority, at any rate, open to question.⁶⁴

In conclusion on the *Clipperton Island* arbitration, the memorandum pointed out that as there was no evidence that Clipperton Island had been administratively attached to another French territory the French Government's argument on this point was effectively answered.

After considering a number of doctrinal authorities and Law Officers' opinions—in respect of the latter especially that of 11 November 1878 over the French annexation of the Chesterfield Reef⁶⁵—the memorandum summed up by stating:

All the classes of authorities appear to be unanimous that in order to acquire sovereignty by occupation over land which is *terra nullius*, there must be both some form of annexation and some act of physical appropriation. In the present case we cannot rely upon anything

⁶⁰ 1928: *Reports of International Arbitral Awards*, vol. 2, p. 829.

⁶¹ 1931: *ibid.*, p. 1105.

⁶² FO 371/16364, ff. 142–51.

⁶³ *Ibid.*, f. 146.

⁶⁴ *Ibid.*, ff. 146–8.

⁶⁵ Printed in McNair, *International Law Opinions*, vol. 1, pp. 320–1.

which took place earlier than 1877 as the act of formal annexation. We must rely on the authorisation given in 1877-78 to hoist the British flag and/or the licence to the Borneo Company in 1889, coupled with the statements in the Colonial Office List.

It seems equally clear that we cannot rely on any event which took place before the first registration of the claim of Messrs. Graham and Simpson as the act of physical appropriation. We cannot rely either upon the visit of H.M.S. 'Rifleman' to the island in 1864, because Captain Ward performed no act during that visit, such as hoisting the British flag, which can be relied upon as a formal annexation of the island, or upon the visit of Messrs. Graham and Simpson in September 1877, before the grant of their licence, seeing that this was a purely unauthorised private venture, and in granting the subsequent licence and permission to hoist the British flag, His Majesty's Government did not ratify and adopt as its own anything that they had already done, but gave them a licence to work the islands for guano in the future and to hoist the British flag. At most these events can only be relied upon as acts in the nature of discovery and creating the 'inchoate title' which is all that discovery alone can create.

Our claim, therefore, as regards the physical appropriation must be based upon acts which took place at any rate subsequent to the grant of the first licence to these persons. In this respect our case is a little stronger as regards Amboyna Cay than it is as regards Spratley Island, seeing that Mr. Graham did go to Amboyna Cay in May 1879, and remained there for some period and may have hoisted the British flag, whereas neither Messrs. Graham and Simpson nor any other British licensees ever visited Spratley Island at all. Both islands were visited by Captain Kerr in May 1889, so that, in the case of Spratley Island, the visit of Captain Kerr appears to be the only act which can be relied on as the act of physical appropriation. Indeed, perhaps, this visit is the strongest point we have on this part of the case.

The general conclusion appears to be that the general current of authority is probably against the claim of His Majesty's Government in international law to these islands. On the other hand, some support for such a claim can be found in expressions of opinion in some text-books of lesser authority and stronger support in the decision of the arbitrator in the Clipperton Island case. Even if one may doubt whether the Clipperton Island decision is good law at any rate so far as the grounds upon which it is based are concerned, the decision is one whose authority it is particularly difficult for the French Government to dispute publicly in an international arbitration.

There are, of course, two questions:—

- (i) Whether His Majesty ever acquired sovereignty over [these] islands or either of them by occupation.
- (ii) If so, had His Majesty lost his rights of sovereignty before 1930 by abandonment or failure to continue to occupy the islands.

Assuming the first to be answered in our favour, in view of the very great diversity of opinion as to what is necessary to retain a title once acquired it would probably be correct to say that there is at least as much authority in our favour as against us upon the second question.⁶⁶

On 30 November 1931 the British Embassy in Paris reported the news that the French authorities had been unable to find any document by virtue of which France claimed Spratly and other islands in the area, but that if no such proclamation had been issued, 'the French Government will make one now and will send us an official notification of their annexation of the area in question'.⁶⁷ This provoked one of the Foreign Office staff to minute:

This is a fantastic state of affairs. It looks as if the French had hitherto merely been making a claim to the islands in the area without having definitely declared their annexa-

⁶⁶ FO 371/16364, ff. 150-1.

⁶⁷ FO 371/15651, f. 542.

tion and that our request for the text of their proclamation is going to be the cause of its formal annexation!⁶⁸

By a letter dated 16 March 1932 the Foreign Office submitted the case to the Law Officers, enclosing the memorandum drawn up by the legal advisers in the previous November. After setting out the history of the case, the letter asked the Law Officers:

(a) Whether in April 1930 His Majesty possessed under international law a claim to sovereignty over Spratley Island and/or Amboyna Cay which could be laid before the Permanent Court of International Justice with either the certainty or a reasonable prospect of success.

(b) Whether it is desirable that the various miscellaneous islands over which His Majesty claims sovereignty should be attached for administrative purposes to some Colony or Protectorate in all cases where such action has not already been taken.⁶⁹

The Law Officers, Sir T. W. H. Inskip, Attorney-General, and Sir F. B. Merriman, Solicitor-General, replied on 29 July 1932. They stated:

(a) In our opinion His Majesty's claim to sovereignty over Spratley Island and Amboyna Cay in April 1930 was of so doubtful a nature that it could only be laid before the Permanent Court of International Justice with a faint prospect of success.

It is now well settled in general that an inchoate title to sovereignty may be acquired either by discovery or by reason of circumstances having an effect similar to discovery, but that the inchoate title thus acquired must be perfected within a reasonable time by an open and continuous exercise of sovereignty, of which the most common form is occupation in fact.

In the present case, however, we are not able to infer from the events which took place in 1877-79 any acquisition of even an inchoate title to sovereignty, still less of a title perfected either by actual occupation or by some other open display of State authority. The visit of H.M.S. 'Wanderer' in 1889, coupled with the lease granted in that year to the Central Borneo Company, and followed by the statements published from 1891 onwards in the Colonial Office list, would, having regard to the fact that the islands are uninhabited, probably have been held to be sufficient evidence of the continuous display of State authority to negative any suggestion of loss of sovereignty by abandonment, but the necessary foundation is, in our opinion, lacking.

We do not in the facts of this case regard the contention of the French Government, which is based upon the absence of any administrative attachment to a British Colony or Protectorate, as being at all conclusive. The circumstances of the islands, and especially the fact that they have no inhabitants, justify and explain the absence of administrative machinery.

(b) Notwithstanding our opinion as to the effect in this case of the absence of any attachment for administrative purposes to a British Colony or Protectorate, we regard it as most desirable that wherever it is possible in the cases of the various miscellaneous islands in question such an attachment should be formed. Such a connexion will afford good evidence of the continuous exercise of State authority.

(c) We have not overlooked the decision in the Clipperton Island case and the reasoning on which it was based. In that case there had been an act of unequivocal annexation by France. That fact being established, it was not difficult to hold in a case of an uninhabited island that the rights acquired by such annexation were perfected and were never lost.⁷⁰

⁶⁸ Ibid., f. 540.

⁶⁹ FO 371/16364, f. 141, p. 7.

⁷⁰ Ibid., pp. 8-9.

(c) *The Admiralty Tries to Intervene*

The Admiralty was not happy about the unwillingness on the part of the Foreign Office to pursue the matter further with the French. In a letter to the Foreign Office of 14 November 1932, the Admiralty wrote:

From a further examination of early reports it seems to be clear that Spratley Island was discovered and not re-discovered in 1843.

. . . it is evident that a clear claim to sovereignty under the head of 'Discovery' can be established.

As the discovery of Spratley Island in 1843 would seem to give a clear claim to sovereignty under the head of discovery, I am to suggest that the Law Officers of the Crown might again be consulted as to the island.⁷¹

The Foreign Office replied on 25 November 1932 on the basis of a minute by Beckett:

The opinion of the Law Officers . . . is to the effect that HMG have no title to Spratley Island because inter alia there had never been any formal annexation or any open display of sovereignty and that, in default of this, discovery giving at most only an inchoate title would be insufficient . . . there is little likelihood that the new information set out in your letter would cause the Law Officers to change the opinion which they have already given.⁷²

In a letter to the Foreign Office dated 8 February 1933, the Admiralty returned to the charge. It recalled that Spratly Island had been discovered by the British whaler *Cyrus* in 1843 (although it now acknowledged that discovery did not give a clear claim). In particular, the Admiralty took issue with the French claim to the islands, islets and reefs in a large zone simply on the strength of a purported annexation of Spratly Island together with a stated interest in acquiring a thorough knowledge of hydrographical conditions in the zone. In its words, 'This claim . . . has no basis in international law and calls for a strong protest without any further delay'.⁷³

The Admiralty suggested that a further note should be sent to the French Government, putting forward all relevant facts supporting the British claim to Spratly Island and Amboyna Cay, including the new information about the discovery of the former, and protesting against the French claim to all islands, islets and reefs in the zone.

In its reply dated 6 March 1933,⁷⁴ the Foreign Office rejected the Admiralty's suggestion. As for the discovery by the *Cyrus* in 1843, 'it is only discovery plus some form of formal annexation which creates an inchoate title to sovereignty—an inchoate title which is valid for a certain time, but disappears if it is not completed by occupation within a reasonable time',⁷⁵ and in the Foreign Office's view the new information did not materially alter the case. The Foreign Office went on to point out that the *French* case for sovereignty had not been submitted for the opinion of the Law Officers, but even if it were still legally open for

⁷¹ FO 371/16364, ff. 157-9.

⁷² Ibid., f. 161.

⁷³ Ibid., f. 298. In a later letter to the Foreign Office, dated 23 February 1933, the Admiralty set out a tabular list of islands, banks and reefs in the area claimed by France but which had been discovered and surveyed by Britain (FO 371/17300, ff. 312-14).

⁷⁴ FO 371/17300, ff. 305-10.

⁷⁵ Ibid., f. 307, citing Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), p. 136.

Britain to annex and occupy some or all of the islands '[t]he result is likely to be a sort of race, which may end in some form of international dispute'.⁷⁶ Lastly, the Foreign Office considered whether there were any circumstances which entitled a State to object on legal grounds to the annexation of territory by another State when it could not claim sovereignty itself. The answer was as follows:

The only circumstances which appear to have been admitted as affording a ground for such a protest is a case where a State has an inchoate title by discovery, plus annexation, and the period within which it is entitled to perfect its inchoate title by occupation has not yet elapsed. This is not the case here. Short of this, it seems that nothing except the prior possession of sovereignty entitles a State to object to an annexation by another State.⁷⁷

As a sop to the Admiralty, the Foreign Office expressed its willingness to hold an interdepartmental meeting on the subject. Accordingly, some months later, on 12 July 1933, a meeting⁷⁸ took place between representatives of the Admiralty and the Foreign Office at which the former expressed the view that whereas it no longer desired to press a British claim to Spratly Island and Amboyna Cay, for which it had no practical use, it wished to be able to use a number of lagoons, atolls and reefs east of Spratly Island, and not mentioned in the French notes, as potential advance seaplane bases in case of future war. The Admiralty speculated on the possibility that a reply might be sent to the last French note, pointing out that while Britain did not dispute the French claim to the islands and reefs mentioned therein it could not agree to the inclusion of the large expanse of sea also claimed.

By a diplomatic note dated 24 July 1933,⁷⁹ the French Ministry of Foreign Affairs advised the British Embassy in Paris of a notice in the *Journal Officiel* for 26 July 1933 to the effect that '[l]e gouvernement français a fait procéder par des unités navales à l'occupation des îles et îlots définis ci-dessous'. The list of six islands mentioned Spratly Island as having been annexed on 13 April 1930, Amboyna Cay on 7 April 1933, and the other islands and islets on other days in April 1933. The notice went on to state that 'Les îles et îlots susindiqués relèvent désormais de la souveraineté française'.

(d) *Japanese Activity*

The Air Ministry, in a letter dated 2 July 1937,⁸⁰ reported that Japanese activity had been sighted on Spratly Island and Itu-Aba, another island in the zone claimed by France. It expressed the view that British possession of advance landing bases would be an advantage and in this context wondered whether a British claim to sovereignty over Spratly Island and Thi-Tu Island could be sustained, or, in the alternative, a lease taken from France, or, in the second alternative, whether steps could be taken to ensure that the islands remained in the effective sovereignty of a State other than Japan, should the French title lapse through desuetude.

The history of the islands was reviewed in the Foreign Office where it was considered that a claim to British sovereignty could not be sustained; on the

⁷⁶ Ibid., f. 308.

⁷⁷ Ibid., f. 309.

⁷⁸ Ibid., ff. 322-3.

⁷⁹ FO 371/17300, f. 328.

⁸⁰ FO 371/21027, f. 440.

other hand, there might be some advantage in encouraging the French to make their occupation more effective. G. G. Fitzmaurice, then Third Legal Adviser, minuted on 19 July 1937:

... It seems to me that our interests will be best served not by putting forward a claim of our own or disputing the French claim, but by admitting their claim so far as we are concerned and persuading them to take the steps necessary to make it proof against challenge from some other power.

If a lease can be secured so much the better. It would have the double effect of constituting an assertion of effective French sovereignty and of putting us in a position to exercise direct supervision over the islands.⁸¹

The Foreign Office instructed the British Embassy in Paris to propose to the French Government that one of two islands in the area claimed by France, Itu-Aba or Thi-Tu, be ceded to Britain, upon which island it might subsequently prove practicable to construct a landing ground.⁸² The Embassy replied on 22 December 1937⁸³ to the effect that the French Government were prepared to give every kind of facility and assurance to the British Government, but would stop short of cession. By a further message, dated 23 December 1937,⁸⁴ the Embassy reported that the French were working on a scheme to lease some of the islands not to the British Government but to a refuelling company.

Further discussions with the French were interrupted by the news that the Japanese had occupied Spratly Island. Although Fitzmaurice minuted that the British claim could not be revived in the event of a French abandonment of its claim,⁸⁵ the Foreign Office sent a telegram to the British Embassy in Paris on 19 February 1938 in which it stated that '[i]f the French Government do not intend to maintain their claim we should wish to revive ours'.⁸⁶ The French having expressed unwillingness to lease the islands in question to the UK, Fitzmaurice minuted on 3 March 1938:

We are clearly here up against the French fear of causing any annoyance to the Japanese, and I doubt whether any amount of argument on our part will cause them to alter. . . .

The Admiralty will probably want us to revive our claim but, as the Law Officers definitely advised that we had no case, we could not do this without going back to them and asking whether they would reconsider the matter and state whether they were still of the opinion that no possible basis for a claim existed. Even if the reply were favourable, we should not get the French to admit our claim and, for political reasons, it would clearly be impossible to take it to arbitration.⁸⁷

On 25 March 1938, Fitzmaurice minuted to Ronald in the Foreign Office in part as follows:

I have gone into the question of whether there is any legal basis, so to speak, on which we could join with the French in making representations to the Japanese. I rather fear that there is not. I have discussed the matter with Beckett who drafted the original reference to the Law Officers and he agrees. The main difficulty is that the Law Officers based their opinion principally on the fact that we had never really formally purported to annex the islands at all. We had never really asserted a definite formal claim to them or made any act of annexation. Thus the question was not so much whether we or the French had the better claim; the position was rather that we had no claim at all. Further,

⁸¹ FO 371/21027, f. 438.

⁸³ *Ibid.*, f. 510.

⁸⁵ FO 371/22174, f. 1^v-2.

⁸² *Ibid.*, ff. 500-6.

⁸⁴ *Ibid.*, f. 512.

⁸⁶ *Ibid.*, f. 34.

⁸⁷ *Ibid.*, f. 42.

even if we had any claim it must probably as a matter of law be regarded as having been washed out by our admission of the French claim.⁸⁸

At the end of March 1939, the Counsellor at the Japanese Embassy in London called at the Foreign Office to announce that Japan had decided to incorporate the 'Sinnan Islands', which included Spratly Island, Amboyna Cay and the other islands and islets between 7° and 12° North latitude and 111° and 117° East longitude, 'in the territory under the jurisdiction of the Government-General of Formosa as of the 30th of March, 1939'.⁸⁹ In a telegram dated 1 April 1939, Howe at the Foreign Office advised the British Embassy in Tokyo of the British reaction to the visit:

He was informed that, if it came to a conflict of claims, it should be recalled that His Majesty's Government had never formally abandoned the claim which they had at one time put forward to these islands. In any case it seemed a strange way of settling a dispute were the other party to seize the object in dispute. Such a proceeding could hardly be expected to commend itself to His Majesty's Government especially at the present time when it was bound still further to complicate the position in the Far East.⁹⁰

A Question on Notice was shortly afterwards set down for answer in the House of Commons asking whether His Majesty's Government would protest against the Japanese action. In preparing the reply, Ronald minuted on 5 April 1939:

Mr Fitzmaurice has pointed out that Mr Howe was not quite correct in telling Mr Okomoto . . . that we had a claim to Spratley which we had never abandoned. I am afraid it was my fault that Mr Howe mentioned this as I asked him to consider doing so. Mr Fitzmaurice calls attention to his minute [of 25 March 1938, especially the passage set out above]. In his view the position seems to be a) that we have never actually asserted any claim publicly b) that, in so far as we may ever have privately thought we had a good claim, we were wrong and c) that, even if we ever did have a claim we abandoned it in favour of the French. In point of fact we never made the communication to the French contemplated in Mr Fitzmaurice's minute referred to and I am therefore not clear as to when we formally abandoned our claim, though no doubt we waived it by implication. And unless my memory is at fault we have mentioned our 'claim' to the French and they disputed it and that was why we referred the matter to the Law Officers 6 or 7 years ago. But all this is ancient history and, as Mr Fitzmaurice says, academic now. Both he and I, however, hope that Mr Butler [R. A. Butler, Parliamentary Under-Secretary of State, Foreign Office] . . . will bear in mind that the Law Officers definitely stated that we had no claim even to Spratley and Amboyna, quite apart from the other islands annexed by France.⁹¹

In a further minute, written by Howe on 5 April 1939, it was stated:

It would seem to be more accurate to say that we considered that we had a claim to Spratley which we had never formally abandoned, but it would be advisable perhaps to refuse to be drawn into any expression of opinion on this aspect in the House.⁹²

On 6 April 1939, in answer to the question, Butler stated in the House of Commons:

Spratley Island is on the western fringe of a large archipelago claimed in full sovereignty

⁸⁸ FO 371/22175, f. 69.

⁸⁹ The text of the Japanese statement is printed in *Foreign Relations of the United States, Japan 1931-1941*, vol. 2, pp. 278-80.

⁹⁰ FO 371/23543, f. 218.

⁹¹ *Ibid.*, f. 250.

⁹² *Ibid.*, ff. 250v-1. The margin was endorsed: 'For Supplementary only in case of necessity.'

by the French Government in virtue of its annexation by decree in 1933. The Japanese Government on 30 March announced that they had placed Spratley Island and the other islands claimed by the French under the administrative jurisdiction of the Government of Formosa. The question of a protest is a matter which primarily concerns the French Government.⁹³

In reply to the supplementary question: 'In view of the fact that we have definite obligations to assist France in the protection of her overseas territory, is it not of the utmost importance that we should associate ourselves with France in any protest at this occupation of French territory by Japan?', Butler stated:

The House will appreciate that this is a matter primarily for the French Government. His Majesty's Government intend to keep in touch with the French Government in this and in all other matters of common concern.⁹⁴

A diplomatic note, dated 10 April 1939, was sent by the British Embassy in Tokyo to the Japanese Minister of Foreign Affairs in the following terms:

I have the honour to inform your Excellency that His Majesty's Government in the United Kingdom have been notified of the decision of Your Excellency's Government published on March 31st last to include the Spratley Islands under the jurisdiction of the Governor General of Formosa.

I am instructed to inform your Excellency that His Majesty's Government are unable to admit that the claim of the Japanese Government has any legal foundation and that they deplore the procedure adopted by them in this matter as it can only complicate still further the situation in the Far East.⁹⁵

In reply, the Japanese Minister advised the Embassy on 13 April 1939:

The Imperial Government find difficulty in understanding wherein the basis of His Majesty's Government representations lies since not only was this measure a lawful act based both upon fact and upon Law but also it is a matter which concerns Japan and France. Furthermore the Imperial Government entirely disagree that this measure will still further complicate the situation in the Far East.⁹⁶

(e) *Post-War Developments*

The Second World War delayed any further detailed discussions of sovereignty over Spratly and neighbouring islands. Despite Fitzmaurice's above opinion and the replies in the House of Commons, it was thought in some circles, perhaps *per incuriam*, that the British claim had not been abandoned. On 14 October 1947 a document, prepared by the Foreign Office in agreement with the Commonwealth Relations Office and the Colonial Office, was circulated to members of the Cabinet (Far Eastern (Official)) Committee to serve as a brief for the UK delegation to the Peace Conference with Japan, and was later approved as such. It read as follows:

Renunciation by Japan of any claims or rights to the islands of Spratley and Amboyna Cay.

On 24 July 1933, the French Government notified HM Government of the assumption of French sovereignty over Spratley Island and certain other islands in the South China

⁹³ Hansard, *House of Commons Debates*, 5th series, vol. 345, col. 2988.

⁹⁴ Ibid. See also vol. 348, col. 874 (12 June 1939).

⁹⁵ FO 371/23543, f. 290.

⁹⁶ Ibid., f. 297.

Sea, including Amboyna Cay. HMG did not accord recognition to this claim. In 1937 and 1938 the Japanese occupied certain islands in this group, and on 31 March, 1939, the Japanese Foreign Office issued a notice stating that the Spratley islands had long been ownerless, that Japanese nationals had established themselves there since 1917 and that the Japanese Government had decided to place them under the jurisdiction of the Governor General of Formosa. HMG informed the Japanese Government that they were unable to admit that the Japanese claim had any foundation in law.

2. It is desirable to ensure that there should be a provision in the Peace Treaty whereby Japan renounces any claims or rights to the islands of Spratley and Amboyna Cay. It would probably not be necessary to refer to those islands by name: but care should be taken to ensure that they are covered by the wording of whatever clause or clauses provide for the renunciation by Japan of rights and claims to territory outside 'the four main islands and adjacent islands'.

3. HMG have a claim to Spratley which has never been formally abandoned; but they are not prepared to contest the French claim to sovereignty which is considered to be good in law. If, therefore, any question arises of referring explicitly to Spratley and Amboyna Cay in the Peace Treaty it should, if possible, be left to France to take the initiative of putting forward detailed proposals.⁹⁷

In 1950, Australia informally asked whether the UK might be prepared to seek trusteeship for Spratly and neighbouring islands. In the course of its reply, dated 24 October 1950, the Foreign Office stated:⁹⁸

In our view the dominant consideration in the disposal of these Islands is their strategic importance. From that point of view we should not object to the ownership of the Islands by France, but we should not wish their ownership to go to Japan, the Philippines, Nationalist China or, particularly, the Central People's Government of China.

The letter ended:

We do not, therefore, see any benefit in pursuing this matter at present, and propose to let it rest for the time being.

By Article 2 (f) of the Treaty of Peace with Japan, signed at San Francisco on 8 September 1951:

Japan renounces all right, title and claim to the Spratly Islands and the Paracel Islands.⁹⁹

In the following period for which the British archives are in principle open, at the time of writing up to the end of 1956, there were some instances of a reluctance on the part of the British Government to abandon its claim to Spratly Island, arising out of projects by private enterprises to carry out work on the island.

In respect of one such project, the Colonial Office cabled the Governor of Hong Kong on 14 January 1956 as follows:

I am advised that the status of Spratley Island in international law is doubtful (although the United Kingdom does not acknowledge the claims of France, China and the Philippines as superior to its own), and it is desirable in consequence to avoid the dilemma which would arise if after a survey the Borneo Pacific Company Limited decided to apply for a licence, since the grant of a licence would purport to resuscitate the United

⁹⁷ FO 371/63778.

⁹⁸ FO 371/83022.

⁹⁹ *United Nations Treaty Series*, vol. 136, p. 8.

Kingdom claim and a refusal would give the appearance of having given it up altogether.¹⁰⁰

In another instance, the Commissioner General for the UK in South East Asia advised the Foreign Office on 5 June 1956 that the Naval Commander-in-Chief, Far East Station, who had been requested by the Shell Company of Borneo to transport a geologist to Spratly Island, had asked whether the ship's commander should take this opportunity to run up a flag and take formal occupation. The Commissioner General asked for Foreign Office guidance in view of his information about earlier events relating to the British claim. In reply, the Foreign Office, in a telegram dated 12 June 1956, pointed out that as there was now a territorial dispute involving the two Chinas, the Philippines and possibly Vietnam over the Nansha Islands the British vessel should 'stay well clear' of Spratly Island. The message went on:

Our claim to Spratley Island has never been abandoned but has also never been pressed, as it is considered too weak, in view of the lack of effective exercise of sovereignty, ever to be likely to win acceptance before the International Court. This remains the position.¹⁰¹

¹⁰⁰ FO 371/123249. There is a current territorial dispute over the Spratly group with conflicting claims put forward by the People's Republic of China, the Republic of China, the Philippines, Vietnam and Malaysia. See details of the claims in *Keesing's Contemporary Archives*, at pp. 26388, 29869, 31149 and 32785. See also, e.g., Chiu and Park, 'Legal Status of the Paracel and Spratly Islands', *Ocean Development and International Law*, 3 (1976), pp. 1-28, which, while it cites historical sources in detail, does not make any mention of the fact that the UK once claimed Spratly Island and Amboyna Cay; Valencia and Miyoshi, 'Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claim Areas?', *ibid.* 16 (1986), pp. 211-54, especially at pp. 244-7; Prescott, *The Maritime Political Boundaries of the World* (1985), at pp. 217-22.

¹⁰¹ PREM 11/1308.

THE EVALUATION OF UNITED NATIONS PEACE-KEEPING OPERATIONS*

By ISTVAN POGANY¹

IN reviewing the literature on UN peace-keeping, it is quickly apparent that little use, if any, has been made of the UN archives.² This is surprising. Students of peace-keeping have generally obtained the bulk of their primary source materials from UN documents.³ However, these give an incomplete, and sometimes misleading, impression.

I. THE DEFICIENCIES OF UN DOCUMENTATION

UN documents on peace-keeping are chiefly of three kinds: reports by the Secretary-General, or by the peace-keepers themselves, on the progress of an operation; the observations of States, whether in oral or in written form; and resolutions adopted by the Security Council or the General Assembly.⁴

Reports by the Secretary-General, or by other UN personnel, are a vital source of information. Nevertheless, the author(s) would be less than human if, owing allegiance to the UN, they did not incline towards a positive construction of the role and activities of UN peace-keeping forces. The author(s) may also be unaware of every deficiency in the field. Finally, a report is the culmination of a lengthy editorial process. Of necessity, every detail concerning the progress of a peace-keeping operation cannot be included.

The observations of States concerning UN peace-keeping measures often challenge the findings in the reports of the Secretary-General. However, such States frequently have a political motive for questioning the credibility of a peace-keeping force and are therefore unreliable as a source of objective information.

Resolutions, whether of the Security Council or of the General Assembly, furnish the constitutional basis of UN peace-keeping. At times they also

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¹ LL B, LL M (Edin.), Lecturer, Faculty of Law, University of Exeter. The author would like to acknowledge the support of the Research Fund Committee of Exeter University, which awarded him a grant to pursue research in the United States during March/April 1985. The author would also like to express his thanks to Mr A. M. E. Erlandsson, Chief of the UN Archives Section, and to Mr H. Hagner, Chief of the Reference and Sound Archives Unit, for their help and guidance in making the relevant records available.

² It is, of course, difficult to *prove* that little, or no, use has been made of the UN archives. Nevertheless, the author has been unable to find an explicit reference to archives material in the scholarly literature on peace-keeping. Even recent publications make no mention of the archives. See, e.g., A. Cassese (ed.), *United Nations Peace-keeping* (1978); H. Wiseman (ed.), *Peacekeeping: Appraisals and Proposals* (1983); I. J. Rikhye, *The Theory and Practice of Peacekeeping* (1984).

³ On the range of UN documentation see, e.g., *United Nations Documentation*, UN Doc. ST/LIB/34/Rev. 1 (1981). On the materials in the UN archives, see p. 358 n. 9 below.

⁴ For a systematic classification of UN documents on peace-keeping see, e.g., the 'Checklist of Documents' sections in the four-volume work by Professor Higgins, *United Nations Peacekeeping*, vols. 1-4 (1969-81).

articulate the attitude of UN organs towards the utility of particular operations. Nevertheless, such resolutions cannot serve as a dispassionate source of information. All too frequently they express the limits of consensus of a heterogeneous membership, motivated by calculations of individual advantage rather than by disinterested service to the ideals of the UN.⁵

In these circumstances, the serious student of UN peace-keeping could benefit from additional primary source materials.⁶ These are available in the largely neglected files of the UN archives in New York.⁷

II. THE UN ARCHIVES

In accordance with UN administrative instructions, the Archives Section 'shall maintain, preserve and repair the archives and non-current records of the United Nations and shall arrange and describe the archive groups and prepare finding aids to make them available for use'.⁸ Thus both 'archives' and 'non-current records' are maintained by the Archives Section. Both are selected from the 'records' of the UN. These comprise 'all documentary materials, regardless of physical type, received or originated by the United Nations or by members of its staff, *excluding* "United Nations documents"'.⁹ The regulations define 'archives' as 'those records to be *permanently preserved* for their administrative, legal, historical or informational value'.⁹ 'Non-current records', by contrast, comprise records 'which are no longer needed for daily use in the transaction of official business but [which] should be preserved *on a temporary basis* because of administrative or legal considerations'.⁹ The Archives Section shall, with the agreement of the Secretariat unit concerned, dispose of 'non-current records that have no further administrative, legal, historical or other informational value'.¹⁰

Thus the archives contain material which is, by the UN's own definition, of 'legal, historical or informational value' *and* which is unavailable in the form of 'United Nations documents'.¹¹ It is, therefore, all the more remarkable that this unique documentary collection has not been utilized more fully by scholars.¹²

⁵ Thus, in a recent article, Professor Franck has observed: 'The United Nations is a corporate body consisting of sovereign member states, gathered in political organs like the General Assembly . . . [and] . . . the Security Council . . . These components of the UN system deliberate, vote and act in accordance with the members' perceived national self-interest. The outcome may be a "UN" resolution, but it is, in fact, no more than an expression of the political will of a multitude of sovereign states': Franck, 'Of Gnats and Camels: Is there a Double Standard at the United Nations?', *American Journal of International Law*, 78 (1984), p. 811 at pp. 830-1. For a similar assessment of the self-interested behaviour patterns of UN members, see, e.g., Pogany, *The Security Council and the Arab-Israeli Conflict* (1984).

⁶ There are, of course, a variety of *secondary* source materials which may be consulted. These include journalistic and scholarly commentaries on peace-keeping. However, such materials rely in turn on UN documents for much of their information.

⁷ The UN archives are located at 345 Park Avenue South, New York. I am indebted to Mr Donald Ross, of the British Library of Economic and Political Science, for bringing the existence of the archives to my attention.

⁸ See UN Doc. ST/AI/326 (28 September 1984), para. 2.

⁹ Ibid., para. 12 (emphasis added).

¹⁰ Ibid., para. 5.

¹¹ Ibid., para. 12.

¹² Explanations for the under-utilization of the archives include their relative inaccessibility, particularly to scholars outside North America, and the dearth of publicity about the materials available. In addition, there are significant restrictions on access. Thus 'members of the public', as distinct from Secretariat personnel, may have access to: (i) archives and records that were accessible at the time of their creation, (ii) those which are more than 20 years old and not subject to restrictions

The following case-study, concerning the UN Observation Group in the Lebanon (UNOGIL), is presented as a modest illustration of the significance of the materials awaiting inspection.

III. THE UN OBSERVATION GROUP IN THE LEBANON

(a) *Background to the Formation of the Observation Group*

The UN Observation Group in the Lebanon (UNOGIL) was established by the Security Council pursuant to a resolution of 11 June 1958. The Group was instructed 'to proceed to Lebanon so as to ensure that there is no illegal infiltration of personnel or supply of arms or other *matériel* across the Lebanese borders' and to 'keep the Security Council currently informed through the Secretary-General'.¹³

Since May 1958, Lebanon had been in the grip of civil war, with a predominantly Maronite administration under President Chamoun confronting a revolt by mostly Muslim insurgents.¹⁴ The Lebanese Government contended that the disturbances were largely the result of intervention in its internal affairs by the United Arab Republic.¹⁵ Initially Lebanon referred the dispute to the Council of the Arab League.¹⁶ However, the Lebanese authorities became increasingly dissatisfied with the League's handling of the conflict.¹⁷ Accordingly, on 6 June, the UN Security Council was convened to consider the Lebanese complaint.¹⁸

Addressing the Security Council, Lebanon's Foreign Minister, Charles Malik, argued that 'there has been, there still is, massive illegal and unprovoked intervention in the affairs of Lebanon by the United Arab Republic'.¹⁹ However, the

imposed by the Secretary-General, and (iii) those which are less than 20 years old and not subject to restrictions imposed by the Secretary-General, on condition that the originating office has given written consent for access': *ibid.*, para. 4 (b). In practice, this means that the bulk of archival material is available after twenty years, or earlier with the written consent of the originating office. However, documents on which the Secretary-General has imposed restrictions may be withheld from the public for *at least* twenty years, and for longer periods in appropriate circumstances. For details see *ibid.*, para. 4 (c) and Annex I. As a result of a somewhat liberal construction of the regulations by the UN archives, any UN office may, in accordance with the same criteria, impose comparable restrictions on access to its records. However, despite these limitations, archival material relating to crucial phases of UN peace-keeping is now generally available. Thus the twenty-year rule does not preclude access to at least a part of the records of the UN Operation in the Congo (1960-4), of the UN Emergency Force (1956-67) or of the UN Truce Supervision Organization (1949-).

¹³ SC Res. 128, paras. 1, 3 (11 June 1958).

¹⁴ For a detailed analysis, see, e.g., F. Qubain, *Crisis in Lebanon* (1961), pp. 68-85; K. Salibi, *The Modern History of Lebanon* (1965), pp. 201-4.

¹⁵ See below, n. 19. The United Arab Republic was formed in February 1958, as a result of the union between Egypt and Syria. See P. Mansfield, *The Ottoman Empire and its Successors* (1973), p. 127.

¹⁶ For details see, e.g., H. Hassouna, *The League of Arab States and Regional Disputes* (1975), p. 62.

¹⁷ See, generally, *ibid.*, at pp. 62-5. See also Qubain, *op. cit.* above (n. 14), at pp. 89-91.

¹⁸ Lebanon had called for an urgent meeting of the Security Council on 22 May: UN Doc. S/4007 (22 May 1958). At a meeting on 27 May the Security Council adopted the Lebanese complaint on to its agenda. However, in accordance with an Iraqi proposal, it decided to postpone consideration of the item until 3 June: see *Security Council Official Records*, 13th Session, 818th meeting, at p. 8 (27 May 1958). The Council complied with a subsequent Lebanese request to defer its consideration of the item for an additional period, in order to permit the League to pursue a settlement: see UN Doc. S/4018 (2 June 1958).

¹⁹ *Security Council Official Records*, 13th Session, 823rd meeting, at p. 4 (6 June 1958).

delegate of the UAR, Mr Loutfi, rejected the Lebanese contention, which he described as 'unsupported by tangible evidence'.²⁰ In view of these contradictory allegations, the Security Council decided to establish UNOGIL with a mandate to ascertain whether there was, in fact, any 'illegal infiltration of personnel or supply of arms or other *matériel* across the Lebanese borders'.²¹

(b) *UNOGIL's Role in the Lebanon*

By 26 June UNOGIL had deployed ninety-four Military Observers in the Lebanon. The figure had risen to 190 by 14 August, and stood at 591 by 17 November.²² In all, the Observation Group submitted seven reports.²³ The first, dated 3 July, confirmed the *presence* of armed men and of weapons at various points in the Lebanon. Nevertheless, it failed to substantiate the Lebanese contention that they had been infiltrated into the Lebanon from the UAR. However, as the Group acknowledged, difficulties of terrain, combined with the hostility of opposition groups, prevented Observers from deploying effectively in precisely those areas where unlawful infiltration could be expected.²⁴

In an interim report, dated 15 July, the Group stated that it had achieved 'full freedom of access to all sections of the Lebanese frontier'.²⁵ Subsequently, on 30 July, the Observation Group reported that the infiltration of arms 'cannot be on anything more than a limited scale' and that 'in no case have United Nations observers, who have been vigilantly patrolling the opposition-held areas and have frequently observed the armed bands there, been able to detect the presence of persons who had indubitably entered from across the border for the purpose of fighting'.²⁶

Following the election of General Shihab to the Lebanese presidency, in succession to Camille Chamoun, UNOGIL commented, on 14 August:²⁷

... the situation in regard to the possible infiltration of personnel and the smuggling of arms from across the border is that, while there may have been a limited importation of arms into some areas prior to the presidential election on 31 July, any such movement has since markedly diminished.

In its final report, dated 17 November, the Observation Group stated:²⁸

In view of the absence for some time of any reports of infiltration of personnel or smuggling of arms and of the recent marked improvement in the general security situation

²⁰ *Security Council Official Records*, 13th Session, 823rd meeting, at p. 24.

²¹ See p. 359 n. 13 above.

²² See Higgins, *United Nations Peacekeeping*, vol. 1 (1969), p. 557.

²³ UN Docs. S/4040 (3 July 1958); S/4051 (15 July 1958); S/4052 (17 July 1958); S/4069 (30 July 1958); S/4085 (14 August 1958); S/4100 (29 September 1958); S/4114 (14 November 1958).

²⁴ UN Doc. S/4040, at paras. 5-11, 24-5 (3 July 1958).

²⁵ UN Doc. S/4051, at para. 1 (15 July 1958).

²⁶ UN Doc. S/4069, at paras. 62-3 (30 July 1958).

²⁷ UN Doc. S/4085, at para. 42 (14 August 1958).

²⁸ UN Doc. S/4114, at para. 20 (17 November 1958). A force of US marines arrived in the Lebanon on 15 July in response to an urgent request from the Lebanese President. However, the US troops were withdrawn by 25 October. The US intervention, which was justified by Lebanese and American spokesmen as collective self-defence, was prompted by the overthrow of Iraq's pro-Western Government, on 14 July: see Mansfield, *op. cit.* above (p. 359 n. 15), at p. 128. The legal issues arising from the US intervention are discussed in the present writer's *The Arab League and Peacekeeping in the Lebanon* (1987).

in Lebanon, and in relations between Lebanon and its eastern neighbour, the Group has come to the conclusion that its task . . . may now be regarded as completed.

On the same day, a letter from Lebanon's Foreign Minister notified the President of the Security Council that 'cordial and close relations between Lebanon and the United Arab Republic have resumed their normal course'.²⁹ The letter requested the Security Council to remove the Lebanese complaint from its agenda. UNOGIL was withdrawn from the Lebanon by 9 December.³⁰

(c) *An Assessment of UNOGIL*

Relying on UN documents, an evaluation of UNOGIL involves a consideration of the written and oral observations of the Lebanese Government, and of UNOGIL's own reports.

In a lengthy statement, issued on 8 July, the Lebanese Government offered a detailed critique of UNOGIL's first report. However, the Lebanese observations were largely confined to *deductions* from UNOGIL's text, and did not contain separate, independently verifiable, information.³¹ Thus the Lebanese Government contended:³²

. . . the report recognizes that night observation has not yet started (paras. 14 (a) and 17 (d)). But when the infiltrators know that the observers are not watching at night, even if they are otherwise watching all the borders, then they will choose precisely the night to carry out their movements. It follows that the Observation Group has not been able so far to carry out its mandate.

On 18 July, during discussion in the Security Council, the Lebanese delegate, Mr Azkoul, reaffirmed his Government's belief that 'massive intervention' had occurred in the Lebanon's internal affairs.³³ He also criticized UNOGIL'S second interim report. Some of these criticisms are, once again, simply deductions from UNOGIL's text:³⁴

First: the report does not make it clear whether permanent observation posts have been established on the frontier. Secondly: the fact that the observers have been able to reach the frontier does not mean that observation has become really effective. Thirdly: the limited observation which the observers are at present capable of carrying out is, as in the past, confined to the daylight hours; all our official information, however, shows that the infiltration of armed men and the supply of arms on a large scale take place during the night. Fourthly: in many cases the observers enter rebel territory in company with the rebels, and at specified times, at which the rebels have nothing to hide from them. Fifthly, we have quite recent and very reliable information that the observers have been turned back in the Baalbek area and have occasionally been fired at, to intimidate them, and that, in view of the dangers to which they might be exposed, they avoid carrying out observation during the night but conduct their investigation in daytime only, when they can be sure that they are safe from any danger . . .

²⁹ UN Doc. S/4113 (17 November 1958). The Security Council decided, on 25 November, to delete the Lebanese complaint from the list of matters of which it was seised: *Security Council Official Records*, 13th Session, 840th meeting, at p. 5 (25 November 1958).

³⁰ For a useful summary of the character and scope of UNOGIL's operations, see Higgins, op. cit. above (p. 360 n. 22), at pp. 531-603.

³¹ UN Doc. S/4043 (8 July 1958).

³² Ibid. at para. 12.

³³ *Security Council Official Records*, 13th Session, 833rd meeting, at p. 4 (18 July 1958).

³⁴ Ibid. at p. 2.

A number of the Lebanese contentions were well-founded. However, as noted above, observations by governments whose vital interests are at stake cannot be treated as wholly reliable.

UNOGIL's assessment of its own operations must also be regarded with a measure of circumspection. In its first report, as previously noted, UNOGIL readily acknowledged that difficulties had been experienced by Observers when seeking to deploy in territory contiguous to the border with the UAR.³⁵ UNOGIL's second report, dated 30 July, also contained passages of considerable candour:³⁶

. . . it is alleged that United Nations observers are not prepared to go out at night to investigate cases of possible infiltration. It is correct that regular ground patrols have not been carried out by night. The Group has given careful consideration to the question of checking, by means of night patrols, possible infiltration routes, but, in view of the harassments suffered by its observers in such areas even by day, it reluctantly came to the conclusion that night patrols would involve a degree of risk to the observers which it could not accept.

Yet, in the same report, the Observer Group concluded that the infiltration of arms 'cannot be on anything more than a limited scale' and that, as regards the infiltration of personnel, UN observers 'have been vigilantly patrolling the opposition-held areas' and had not found a single instance of someone having 'indubitably entered from across the border for the purpose of fighting'.³⁷ Similar conclusions, emphasizing the minimal, and diminishing, character of illegal infiltration into the Lebanon, were submitted by UNOGIL in its subsequent reports.³⁸

In addition to the reports of UNOGIL and the observations of the Lebanese Government, there is a useful body of scholarly literature.³⁹ In particular, Fahim Qubain offers an incisive critique of UNOGIL's effectiveness:⁴⁰

If we assume, for the sake of argument, that there was extensive infiltration of men and arms, then it is clearly evident that the Observation Group possessed neither the men, nor the equipment, nor the powers to enable it to 'observe,' let alone 'check' and 'prevent.' Given the virtually inaccessible nature of the terrain where smuggling and infiltration was allegedly taking place; given the fact that the local people in the frontier areas knew every inch of this terrain and could travel at night using animal, in addition to motorized, transport; given the fact that the whole length of the land frontier with Syria, with the exception of some 18 kilometers, was held by the opposition, it would seem that a much larger number of fully-equipped observers, with perhaps some 60 fully-manned observation posts, and complete freedom of access and movement to all parts of the country, would have been needed to achieve the task.

In addition, Qubain notes, 'there were strong rumours—the truth of which this writer can neither confirm nor deny—that the Observation Group did not take its task seriously'.⁴¹

However, secondary sources depend, inevitably, on primary materials. The bulk of such commentators have relied, to a significant degree, on UN

³⁵ See p. 360 n. 24 above.

³⁶ UN Doc. S/4069, at para. 8 (30 July 1958).

³⁷ Ibid. at paras. 62, 63.

³⁸ UN Docs. S/4085, at para. 42 (14 August 1958); S/4100, at para. 54 (29 September 1958); S/4114, at para. 20 (17 November 1958).

³⁹ For a bibliography see Higgins, *op. cit.* above (p. 360 n. 22), at p. 603.

⁴⁰ Qubain, *op. cit.* above (p. 359 n. 14), at pp. 150–1.

⁴¹ Ibid. at p. 151.

documents. In this way a cycle of incomplete, and possibly misleading, information has been perpetuated.

(d) *The United Nations Archives*

The UN archives offer a fresh perspective on UNOGIL. In particular, they raise doubts about the quality and competence of a proportion of the Military Observers. Such reservations call into question, in turn, UNOGIL's confident conclusions concerning the nominal character of illegal infiltration into the Lebanon.

1. *The competence of the Military Observers*

In accordance with UNOGIL's internal rules, proficiency in English and an ability to handle vehicles in 'rugged' country were considered 'essential' qualifications for Military Observers.⁴² The importance of these skills was spelt out in a set of notes prepared for the guidance of newly appointed Military Observers:⁴²

4. Knowledge of English, the working language of the Mission, is essential. It is used in internal communications, in voice radio and in the preparation of reports . . .

5. He should have the ability to drive jeeps and cars in normal traffic conditions and in rugged, open country. This is important!

It is surprising, therefore, to find that 'increasing numbers' of Military Observers were arriving in the Lebanon without these 'essential' qualifications. This revelation is contained in a letter, dated 3 October 1958, from Mr S. Habib Ahmed, UNOGIL's Chief Administrative Officer, to Colonel J. MacCarthy, the Observer Group's Deputy Chief of Staff.⁴³

It has come to my attention that UNMOs [United Nations Military Observers] without adequate knowledge of English and without adequate qualifications as drivers are arriving in increasing numbers . . . the lack of these qualifications seriously limits their usefulness.

The implications of Military Observers being unable to communicate with one another, owing to the lack of a common language, are readily apparent. The consequences of Observers having inadequate driving skills are also clear. In its first report, as previously noted, UNOGIL commented on the difficult terrain in some of the border regions.⁴⁴ An ability to handle jeeps in 'rugged, open country' was therefore essential.

Ahmed's allegations concerning the inadequate skills of some Military Observers were confirmed by Colonel MacCarthy. In a handwritten memorandum to the Chief Administrative Officer, UNOGIL's Deputy Chief of Staff

⁴² *Notes for the Guidance of an Observer on Appointment to UNOGIL* (29 September 1958), at p. 2, DAG 13/3.7.o., Box No. 1, File No. 200, Part A.

⁴³ See DAG 13/3.7.o., Box No. 1, File No. 200, Part B. For an earlier allusion to the poor English of some Observers, see the minutes of a meeting of senior UNOGIL officers held on 30 September 1958. This notes that '[a] suggestion by G3 [Ground Operations] that English language classes be held for non-English speaking UNMOs will be taken under consideration'. See Minutes, 8th OICs (Officers in Charge) Meeting (30 September 1958), DAG 13/3.7.o., Box No. 2, File No. 205.

⁴⁴ See above, p. 360 n. 24.

undertook to 'return . . . all non-English speakers as soon as the present influx is stabilized'.⁴⁵

Additional evidence of the poor English of some Military Observers can be found in a memorandum to Mr Habib Ahmed from Paul Altorf, UNOGIL's Chief Communications Officer. Altorf complained that, even where competent personnel were *transmitting* messages:⁴⁶

. . . [it] will be of no avail as long as their counterpart at the distant stations are not able to properly copy telegrams in English . . . The consequent result is that the exchange of traffic on many occasions is slowed down whilst on top of this a number of messages may arrive garbled to such an extent that additional telegrams have to be sent for rectification.

From the available records, it appears that some of the Observers spoke virtually no English.⁴⁷ Thus a 'Military Staff Instruction', dated 8 October, comments that 'it has come to attention that a number of observers need instruction in *basic* English language conversation'.⁴⁸

Further evidence of the inadequate driving skills of some Military Observers can be found in the minutes of a meeting of senior UNOGIL officers held on 7 October.⁴⁹

DCOS [Deputy Chief of Staff] stated that some UNMOs failed their driver's test . . . No UNMOs without a license are permitted to drive vehicles. As soon as they have received a license, Station commanders should arrange for those UNMOs without experience in cross-country driving to undergo the necessary practice.

The same document reveals that English lessons were being introduced for those Observers with a poor command of the language.⁵⁰

The DCOS requested Station commanders to institute English language lessons. He noted that OICs [Officers in Charge] TRIPOLI and MARJAYOUN had already begun to have non-English speaking officers take these lessons.

2. *The attitude of the Military Observers*

There was a widespread belief, especially in certain Lebanese circles, that 'the Observation Group did not take its task seriously'.⁵¹ There is some support in the archives for this proposition. A letter from UNOGIL's Chief Personnel Officer, Major Siilasvuo, dated 15 October, requested Section Heads 'to organize their duties so that each Military Observer will have at least one day free each week. This day should as far as possible be Sunday'.⁵² UNOGIL had previously

⁴⁵ The date of the memorandum, which is barely legible, is probably 3 October 1958: see DAG 13/3.7.o., Box No. 1, File No. 200, Part B. Ahmed was rebuked by David Blickenstaff, UNOGIL's Principal Secretary, for meddling in matters which did not concern him. In a letter dated 4 October, Blickenstaff warned Ahmed that the question of the skills of Military Observers was a matter which 'would not appear to fall primarily within the administrative aspects of the Mission's work': *ibid.*

⁴⁶ See DAG 13/3.7.o., Box No. 2, File No. 203. No date is available for the memorandum.

⁴⁷ Military Observers were drawn from the following countries: Afghanistan, Argentina, Burma, Canada, Ceylon, Chile, Denmark, Ecuador, Finland, India, Indonesia, Ireland, Italy, Nepal, Netherlands, New Zealand, Norway, Peru, Portugal, Sweden. See Higgins, *op. cit.* above (p. 360 n. 22), at p. 555.

⁴⁸ Emphasis added. See Military Staff Instruction No. 58/19 (8 October 1958), in DAG/13/3.7.o., Box No. 2, File No. 203.

⁴⁹ Minutes, 9th OICs Meeting (7 October 1958), at p. 1, DAG 13/3.7.o., Box No. 2, File No. 205.

⁵⁰ *Ibid.* at p. 2.

⁵¹ Qubain, *op. cit.* above (p. 359 n. 14), at p. 151.

⁵² See DAG 13/3.7.o., Box No. 1, File No. 200 B.

reported, on 29 September, that 'no cases of infiltration have been detected . . . if any infiltration is still taking place, its extent must be regarded as insignificant'.⁵³ Nevertheless, by inviting Section Heads to ensure that Military Observers were relieved 'as far as possible' from their duties on Sundays, the Observer Group was limiting its own ability to correct its earlier assessment of the extent of illegal infiltration.

There is, in addition, some evidence of off-duty drunkenness by Military Observers. More seriously, archives material indicates that some Observers engaged in political discussions with local Lebanese. These inferences can be drawn from a number of documents. Thus the minutes of a conference of UNOGIL senior officers held on 5 November noted:⁵⁴

There have been several examples of UNMOs not paying their bills and also several times UNMOs have been seen worse for liquor in uniform in bars, nightclubs etc., discussing politics with the local population.

The minutes of an earlier conference of senior officers, held on 3 September, hinted that certain Observers had colluded with diplomats from their home countries:⁵⁵

The COS [Chief of Staff] reiterated the absolute necessity for UNMOs to refrain from discussing UNOGIL business with their national diplomatic staff in Lebanon.

In sum, there is evidence in the archives of the politicization of a number of Military Observers, and of an increasingly casual attitude, on the part of the Observation Group as a whole, towards its responsibilities.

3. *Aerial observation*

In discharging its mandate, UNOGIL relied on reconnaissance from aircraft and helicopters, as well as on ground-based Observers. During June, air observation was minimal. In July, however, 360 flying hours were recorded by UNOGIL Observers while, in August, the figure rose to 494. The numbers of Air Observers increased from twenty in mid-July to seventy-three by the end of September.⁵⁶

Other commentators have already used UNOGIL's own reports to expose the shortcomings of its air operations. Thus Fahim Qubain laments the 'futile use of air patrols during the night—which under different circumstances would have been of immense value',⁵⁷ while the Lebanese Government noted that 'even if . . . aerial reconnaissance were fully operative, it would still have two limitations: it cannot spot all infiltration during the day, and it can hardly spot anything during the night'.⁵⁸

However, the UN archives reveal further deficiencies in UNOGIL's aerial reconnaissance. Instructions issued on 9 September warned the Observation Group's Air Observers to abide by the following guidelines:⁵⁹

⁵³ UN Doc. S/4100, at para. 54 (29 September 1958).

⁵⁴ Minutes of Second National Senior Officers' Conference (5 November 1958), at p. 1, DAG 13/3.7.o., Box No. 2, File No. 205.

⁵⁵ Minutes of First National Senior Officers' Conference (3 September 1958), at p. 1, *ibid.*

⁵⁶ See Higgins, *op. cit.* above (p. 360 n. 22), at p. 557.

⁵⁷ Qubain, *op. cit.* above (p. 359 n. 14), at p. 148.

⁵⁸ UN Doc. S/4043, para. 13 (8 July 1958).

⁵⁹ Air Wing Order No. 2 (9 September 1958), at p. 2, DAG 13/3.7.o., Box No. 2, File No. 207. The Order apparently superseded Air Wing Order No. 1, issued on 9 July 1958: *ibid.* at p. 1.

No flights closer than 5 kilometres of the borderline . . . Minimum height over Opposition-held area will be 300 metres. If small arms fire is expected, the minimum height should not be less than 800 metres.

As the Lebanese Government claimed that arms and guerrillas were being infiltrated from the UAR, the prohibition of 'flights closer than 5 kilometres of the borderline' deprived UNOGIL's aerial observation of at least some of its usefulness. While aerial reconnaissance from this distance might readily detect the movement of vehicles across the border, it is more doubtful if, for example, it could identify whether particular vehicles were carrying agricultural produce, or whether they contained weapons destined for the insurgents. Concern to avoid an accidental infringement of the UAR's sovereignty accounted for the '5 kilometre' rule. Nevertheless, it handicapped the Group's air observation capabilities.⁶⁰

The requirement that air patrols observe a minimum height of 300 metres 'over Opposition-held areas' was, no doubt, intended to minimize the risk of antagonizing the insurgents or of provoking attacks on the Observation Group's aircraft. The adjustment of the minimum height to at least 800 metres '[i]f small arms fire is expected' was actuated by similarly cautious motives. However, it was precisely in 'Opposition-held areas' that infiltration was likely to occur, while 'small arms fire' may have been used by the insurgents to discourage the Observers from witnessing acts of illegal infiltration.

The present writer is not qualified to evaluate, with any degree of precision, the implications for aerial reconnaissance of flying at heights of 300 or even 800 metres. However, some impairment of vision must have occurred. The very fact that Air Observers were instructed to maintain these minimum heights suggests that they might otherwise have chosen to fly at lower altitudes.

The number of Air Observers, as noted previously, increased dramatically during the course of the operation. At 17 July there were seventeen; by 29 September there were seventy-three. The figure had risen to ninety by 17 November.⁶¹ However, a purely arithmetical analysis of pilot numbers cannot reveal the effectiveness of UNOGIL's aerial operations. Apart from restrictions on altitude, etc., there were additional factors which must be taken into account. Lieutenant-Colonel Fatigati, the Acting Chief of Air Service, noted in a letter dated 29 October: '[f]or all new pilots, it has been the order from the beginning that they were only permitted to fly daylight missions under good weather conditions'.⁶² Thus pilots were initially, and for an unspecified period, unable to participate fully in the Group's programme of aerial observation.

However, there is no record in the file of Air Wing Order No. 1. It is also noteworthy that there is no reference in UNOGIL's Fourth Report, issued at the end of September, to the operational limitations specified in Air Wing Order No. 2: see UN Doc. S/4100, especially at paras. 10-17 (29 September 1958).

⁶⁰ In its second report, dated 30 July 1958, UNOGIL stated that its Air Observers had seen a number of vehicles crossing the border into the Lebanon: see UN Doc. S/4069, para. 20. However, the mere sighting of vehicles was not tantamount to discovering whether illegal infiltration of arms and of weapons was taking place. Moreover, in the absence of Air Wing Order No. 1, it is unclear whether Air Observers were permitted greater freedom of action prior to Air Wing Order No. 2 of 9 September 1958.

⁶¹ See Higgins, *op. cit.* above (p. 360 n. 22), at p. 557.

⁶² See letter from Lt.-Col. Fatigati to Mr S. Habib Ahmed concerning 'Pilot Qualifications' (29 October 1958), DAG 13/3.7.o., Box No. 2, File No. 207.

4. *Additional information*

The archives reveal not only the deficiencies in the Observation Group's operations, but also some of the dilemmas with which all peace-keeping forces are confronted. Thus any peace-keeping operation can only remain effective if it enjoys a reputation for neutrality. Safeguarding this reputation can lead to some difficult, and even brutal, choices. An order issued to UNOGIL Observers on 5 August noted:⁶³

2. UNMOs will not affect the performance of minefields in any manner. To influence the performance of a minefield is an act hostile to the force which laid the mines and hence is open to retaliation without redress.

3. In addition to the ban on lifting and tampering with mines, it is forbidden to divulge the location of mines to non-UN agencies.

An order to Military Observers dated 17 August noted:⁶⁴

During the course of their duties, observers are constantly seeing positions or military arrangements which are of interest to the other side. Observers will NOT discuss, with either party, affairs or personnel of the other party.

Similar considerations prompted an *aide-mémoire* to Military Observers of 2 July. Military Observers were warned that '[n]o "laissez-passer", visas or other "safe-conduct" passes can be accepted by UNMOs from any party, UN personnel are supposed to be inviolable and free to move anywhere in Lebanon'.⁶⁵

Observers were also expected to refrain from political discussions with the local population. This was spelt out by General Odd-Bull, UNOGIL's Chief of Staff, at a meeting of senior officers, on 4 November:⁶⁶

... it is more important than ever that UNMOs not give even the impression of meddling into the political affairs of the nation. When on patrol, officers should by all means listen to what anybody cares to say to them but they will refrain from taking part in political discussions. They should not ask questions on political matters.

The same impulse of neutrality was responsible for the decision that 'dealings with the press must be kept to a minimum'. UNOGIL's Deputy Chief of Staff warned that 'under no circumstances will they [journalists] be permitted to accompany UNOGIL patrols. This is a policy decision from UN headquarters in New York'.⁶⁷

As the records of UNOGIL illustrate, peace-keeping forces have been confronted, on occasion, with humanitarian problems involving the local civilian population. Thus, in a letter dated 20 August, Lieutenant-Colonel Hla Myint, Officer in Charge of UNOGIL's Tripoli Station, wrote to the Observation Group's Chief Administrative Officer:⁶⁸

A Lebanese citizen who has been made destitute by the recent troubles has appealed to this station for assistance. She refuses to return to the local authorities as she maintains

⁶³ Military Staff Instruction No. 58/2 (5 August 1958), DAG 13/3.7.0., Box No. 2, File No. 203.

⁶⁴ Military Staff Instruction No. 58/6, Annex 8 (17 August 1958), *ibid.*

⁶⁵ UNOGIL Operation Order No. 1, Annex 5, at para. 3 (2 July 1958), DAG 13/3.7.0., Box No. 2, File No. 203.2.

⁶⁶ Minutes, 13th OICs Meeting (4 November 1958), at p. 1, DAG 13/3.7.0., Box No. 2, File No. 205.

⁶⁷ Minutes of Meeting with OICs (12 August 1958), at p. 3, *ibid.*

⁶⁸ See DAG 13/3.7.0., Box No. 2, File No. 300.

that they have been approached several times in the past without success. It is embarrassing to turn away people in need and certainly does not enhance our reputation.

With evident sympathy Mr Habib Ahmed, the Chief Administrative Officer, referred the letter to his immediate superior David Blickenstaff, UNOGIL's Principal Secretary. In an accompanying note, dated 25 August, Mr Ahmed commented: 'I wonder if you consider this to be a matter for discussion with the Lebanese Liaison Committee.'⁶⁹

In an undated memorandum, the Principal Secretary replied to Mr Ahmed: '[i]t would be neither practical nor advisable to take this up with the Liaison Committee, I believe. This is a field of activity in which we should not become involved.'⁷⁰ Mr Ahmed notified Lt. Colonel Myint accordingly on 1st September.⁷⁰

It is gratifying that UN missions no longer regard humanitarian work as beyond their jurisdiction. As the activities of UNIFIL demonstrate, particularly since Israel's intervention in the Lebanon in 1982, UN peace-keeping forces have become actively involved in the provision of aid to civilians.⁷¹

IV. CONCLUSION

The UN archives make a significant contribution to the evaluation of UNOGIL. In particular, they expose the lack of essential linguistic and driving skills of at least a proportion of the Group's Military Observers.⁷² The archives

⁶⁹ See DAG 13/3.7.o., Box No. 2, File No. 300. On the formation and composition of the Lebanese Liaison Committee see the Letter from the Prime Minister of the Lebanon to Maj.-Gen. Odd-Bull. This is reproduced as Annex 1 in UN Doc. S/4029 (16 June 1958).

⁷⁰ See DAG 13/3.7.o., Box No. 2, File No. 300.

⁷¹ In a report dated 11 June 1982, a matter of days after the commencement of Israel's intervention in the Lebanon, the Secretary-General commented: 'In the prevailing circumstances and as an interim measure, I have instructed General Callaghan [UNIFIL Commander] to ensure that all UNIFIL troops and UNTSO observers attached to the Force continue to man their positions unless their safety is seriously imperilled *and to provide to the fullest extent possible protection and humanitarian assistance to the population of the area*' (emphasis added): see UN Doc. S/15194/Add. 1, at para. 20 (11 June 1982). In a subsequent report, dated 13 August, the Secretary-General noted that UNIFIL 'has been deeply engaged in extending protection and humanitarian assistance to the civilian population in its area': UN DOC. S/15362, at para. 16 (13 August 1982). The humanitarian functions assumed by the Force were approved by the Security Council in a number of resolutions: see, e.g., SC. Res. 511, para. 2 (18 June 1982); SC Res. 519, para. 2 (17 August 1982).

⁷² It may be objected that too much has been made of the incompetence of some UNOGIL personnel as the bulk of Observers, during the critical months of June, July and August, were probably familiar with English and skilled in the use of jeeps. This conclusion may perhaps be drawn from Mr Ahmed's letter, dated 3 October, in which he noted that 'UNMOs without adequate knowledge of English and without adequate qualifications as drivers *are arriving in increasing numbers*' (emphasis added). See above, p. 363 n. 43. However, it is by no means clear that, until the end of September, *all* Military Observers were properly qualified. Even if that was the case, there were insufficient Observers, before September, to monitor the border areas. Thus, by 14 August, there were only 166 Ground Observers and twenty-four Air Observers: see Higgins, op. cit. above (p. 360 n. 22), at p. 557. Fahim Qubain derides the ability of a force of this size to monitor infiltration across the Syrian border: op. cit. above (p. 359 n. 14), at p. 150. Moreover, it is impossible to confirm or refute the premiss that the bulk of illegal infiltration had ceased prior to September, owing to the deployment 'in increasing numbers' of unqualified Observers from that month onwards. The election of General Shihab as president at the end of July, in succession to the overtly partisan Camille Chamoun, removed a principal cause of the fighting and thus of the alleged infiltration. However, bitter inter-communal fighting broke out once again in September–October 1958, following the appointment of several prominent anti-Chamounists as Cabinet ministers in September. See H. Cobban, *The Making of Modern Lebanon* (1985), pp. 91–2. Thus it is clearly possible that there was further infiltration of arms and of men into the Lebanon.

also confirm, up to a point, the allegations that have been made about the casual attitude of the Observation Group. They suggest, in addition, that some Observers failed to maintain the UN's strict code of neutrality. Significantly, the archives reveal the self-imposed limitations of UNOGIL's aerial observation activities. They also illuminate the recurrent problems of UN peace-keeping more graphically, and in greater detail, than UN documents. It is to be hoped that this case-study will stimulate further research in the UN archives. Our understanding of UN peace-keeping, and of other areas of UN activity, could be significantly enhanced by an examination of this unique documentary collection.

REVIEWS OF BOOKS

The Right to Food. Edited by P. ALSTON and K. TOMASEVSKI. Dordrecht: Martinus Nijhoff, 1984. 228 pp. £24.95.

This commentator must admit to having approached this volume of essays with a certain degree of scepticism, being a positivist lawyer by inclination. It must be equally admitted, however, that a surprising change of mind took place having read through the essays, and this reviewer is now convinced that the problems relating to this subject are less legal or even practical ones, than those of political will and determination. Further, in looking at this problem, a great deal of analysis was undertaken of the nature of international law and organization which renders this volume interesting over and above the subject-matter considered.

The importance of the problem itself cannot be denied. The need for food is both fundamental for life and is required on a regular basis, preferably daily! How it is to be achieved, however, may be summed up by a statement by Spitz in his essay on the historical perspective of food management: 'in the industrialised countries of today, social achievements are not the natural outcome of economic growth; they have been reached through social struggles, through people's organisations and trade unions inspired by "utopian" ideas such as social justice'. The authors are all very well aware of the shortcomings of the present international organizations, being run principally by government representatives. For this reason, the essay by Dias and Paul on the role of NGOs, both national and international, is both helpful and extremely instructive. In this connection, it is to be mentioned that the most fascinating and enjoyable essays to read are the last three in the volume, for they analyse in a concrete way and on the level of the individual the *processes* by which groups of people find themselves in a situation of starvation (i.e. usually poverty), and in most cases the situations are avoidable given the right policies.

This brings us to the role of international law. Having generated the necessary political will by pressure from beneath, is this a subject which can be regulated? The authors all quite rightly reject food aid in the form of charity as worse than useless, the only exception being temporary measures after a natural disaster. The jurisprudential problems relating to the concept of economic and social rights are dealt with in the first seven essays in a very convincing manner, particularly in those of Alston, van Hoof and Westerveen. Space does not allow a résumé of all the arguments, but the principal ones may be summarized as follows: the right to food can be most usefully seen as an *obligation* undertaken by States to adopt certain measures conducive to a satisfactory situation with regard to nutrition. This obligation has already been legally undertaken by those States which have ratified the International Covenant on Economic, Social and Cultural Rights. The role of a supervisory organ (supposedly ECOSOC) *should* be to evaluate *standards* in order to then undertake the corrective function of criticizing and/or helping the States which have not met these standards. The standards should include all aspects of States' obligations, i.e. to avoid actively depriving people of food by certain policies and by initiating policies to improve the situation; both these measures can be achieved by national legislation and effective administrative action. The major problem is that these standards have not been drawn up either by ECOSOC, with its ineffective working group, or by the FAO. The authors concede that the details of the application of these general standards will vary according to the particular country, but this type of assessment is not foreign to the legal process. Finally, van Hoof persuasively refutes the argument that the provisions of the Covenant on Economic, Social and Cultural Rights are moral and not legal because they cannot be enforced by individuals in an international court. He indicates *inter alia* that

different types of legal systems require different enforcement mechanisms, and that the horizontal structure of international law renders the system of imposing obligations by inter-State supervision the most practical.

The only criticisms this reviewer would have of the first seven essays is that they involve a certain amount of unnecessary repetition and in places some lengthy jurisprudential analyses which could render sceptics more convinced of the impracticability of the subject. The same is true of references to 'soft law' or international law as a 'process', both terms confusing the sociological background to the development of the law with the law itself. This confusion does great disservice to international law, and in this context is quite unnecessary. Despite these drawbacks, however, this book is to be recommended for human rights lawyers and also for those international lawyers interested in the concept of the enforcement of economic and social obligations.

LOUISE DOSWALD-BECK

State Immunity: An Analytical and Prognostic View. By GAMAL MOURSI BADR. The Hague, Boston, Lancaster: Martinus Nijhoff, 1984. viii + 243 pp. f 120; \$46; £30.50.

The problem of State immunity has always been of considerable importance. It has to be emphasized, however, that today its practical aspects have become far more widespread than ever before. This is caused by increasing transnational relations within the international community. The question of State immunity cannot be satisfactorily answered without thorough research into municipal law as well as international law. These two approaches inevitably overlap, making the area of study even more complex and demanding.

The author presents his historical, analytical and prognostic view in three parts (I—'The Evolution of the Doctrine of State Immunity'; II—'The Doctrine of State Immunity: A Critical View'; III—'The Seven Recent Instruments: Common Features and Distinctive Provisions'). The book starts with an extensive historical background to the problem. Although much of the information has already been broadly discussed in other contributions, it ought to be stressed that this review of the genesis of the theories of State immunity is necessary to the author's approach to the problem. There is not much said about the notion of State immunity as such. True, in the course of the work, the author considers the distinction between jurisdiction and execution, when he observes that they should not be confused with each other, and consequently he treats them separately. But, strictly speaking, jurisdiction can be exercised on the legislative, judicial and enforcement planes. Therefore immunities from jurisdiction can operate on these three planes, too.

As with most works on State immunity, the *Schooner Exchange v. McFadden* case opens the discussion. Here, however, the author remarks that the *Schooner Exchange* case can be 'said to be the harbinger of the restrictive theory of immunity rather than, as commonly maintained, the starting point of the absolute theory' (p. 13). Referring to decisions from the nineteenth century which are cited in connection with State immunity, he argues that their citation in support of the absolute theory is 'a curious phenomenon, due perhaps to a hasty perusal of those decisions or to second-hand knowledge of them' (p. 19). This, however, may be just a question of looking at the same matter from different angles—a question of a particular approach.

In presenting the emergence of the rules of State immunity, the author employs a number of cases from different jurisdictions. He points out that, during the period before the Second World War, there was no protest or other diplomatic representation made to any of the States applying the restrictive rule by those other States which failed in their pleas of immunity before the courts of the former. This is taken to be an argument against

the claim 'that there exists a rule of customary international law requiring States to grant immunity in all cases to other States before their courts' (p. 34). An argument of a similar nature is used in relation to the UK State Immunity Act. Copies of the Bill were sent to all diplomatic missions in London. The author concludes: 'Practically the whole international community is diplomatically represented in London. The fact that none of the States to whose London embassies the bill was communicated cared to raise any objection to the severely restricted immunity reflected in the bill . . . is an eloquent refutation of the claim that a rule of customary international law exists, requiring that no State be subjected to the jurisdiction of the courts of another State without its clear and specific consent in every individual case' (p. 52). As may be guessed from the above, the author dismisses the theory of absolute immunity and turns towards the second theory. He then faces a problem of the distinction between the public acts and the private acts of the State. He sees a real need for a way of distinguishing these two kinds of acts which would not be difficult to apply and would not lead to controversial results. The author gives four differences between a public act and a private act of a foreign State. These concern: 1. The formation of each act, 2. The parties to each act, 3. The contents of each act, 4. The sanctions (pp. 68-9).

Further, a more practical approach is presented. The author suggests that all transnational intercourse can be said to have the character of an intrusion into the legal domain of other States: 'Such intrusion entails the possibility . . . of a foreign law being applied to the relationship or of a foreign court being found to have jurisdiction over disputes stemming from it' (p. 88). Subsequently the author tries to find a common ground between the two theories of State immunity. It appears that from the practical point of view the 'gap between States adhering to the restrictive doctrine and States professing adherence to the absolute doctrine is neither as wide or so unbridgeable as it would at first seem to be' (p. 100). The clue to this is provided by the notion of 'reciprocity', which has always played a prominent role in international relations. As a result there are many cases in which those States which support the absolute theory of State immunity accept restrictions on their jurisdictional immunities abroad.

As to immunity from execution, the author admits that it is generally more widely accepted as compared to immunity from suit. Although he notices a trend in the practice of some States towards restricting immunity from execution, it seems that the author sympathizes with absolute immunity.

Finally, seven recent instruments on State immunity are analysed. They are: the European Convention on State Immunity and Additional Protocol 1972, the US Foreign Sovereign Immunities Act 1976, the UK State Immunity Act 1978, the Singapore State Immunity Act 1979, the Pakistani State Immunity Ordinance 1981, the South African Foreign States Immunities Act 1981, the Canadian State Immunity Act 1982. It is worth noting that the texts of all seven documents, plus the International Law Association Montreal Draft Convention on State Immunity, are included at pp. 170-235.

The author's concluding remark is that 'like a good craftsman, the lawyer should efficiently use the tools of his trade to produce his artifacts, rather than, like the shoemaker of folklore, put his faith in the good elves who would come in the dead of night to do his work for him. State immunity is one of the few elves still lurking in the remote recesses of the woods we lawyers inhabit' (p. 151).

This interesting book lacks a separate list of bibliographical references. A list of abbreviations used in the book would also have been useful. This reader would have found it more convenient had the publisher included the references at the foot of the text, rather than at the end of the book.

Z. WŁOSOWICZ

Vers un Nouvel Ordre Économique International: Étude centrée sur les aspects juridiques (Travaux de la Faculté de Droit de l'Université de Fribourg Suisse, Volume 56). By ROMUALDO BERMEJO. Fribourg: Éditions Universitaires Fribourg Suisse, 1982. 527 pp.

This book offers a widely descriptive account of the background, problems and programme of a new international economic order (NIEO). The broad and complex subject-matter is dealt with in four major sections. Part I sets forth, in the French tradition, doctrinal notions of international economic law and a brief history of successive international economic regimes. Part II responds to the question why a new order is necessary in the light of North-South disparities and widespread misery in the Third World. It concludes with a broad and abstract definition of NIEO, entirely focusing on North-South relations, and without limitation to economic issues: 'un système de relations dans des domaines multiples (économiques, juridiques, sociaux, institutionnels, culturels et autres), fondé sur un ensemble de valeurs, reconnues et acceptées par tout les États pacifiques, grâce auquel le développement choisi par chacun de ces États sera garanti dans des conditions équitables' (p. 104). Part III elaborates on the right to develop and 'equity' as the fundamental principles of NIEO. Part IV, finally, absorbing roughly half of the volume, discusses the 1974 Declaration on the Establishment of a New International Economic Order, its Programme of Action and the Charter of Economic Rights and Duties (CERDS) as the main pillars of NIEO.

In general terms, the author submits a fairly typical Third World or Latin-American perspective. He shares the assumption that underdevelopment and misery are mainly, if not exclusively, caused by the present order and Western domination. He supports the right to develop both for State and individual, the former based on Vattel's *offices de l'humanité*, and the latter derived from a number of expressed guarantees of human rights in international instruments (pp. 125-41). Permanent sovereignty over natural resources (perceived as *jus cogens*, p. 256) is a fundamental condition of economic development, and nationalizations are genuine acts of development (p. 263). The controversial provision of Article 2 (2) (c) CERDS, which removes international law standards of compensation, is held to be established in law (p. 258), though the author elsewhere relies on a behavioural approach to resolutions and declarations, acknowledging the blocking effects of abstentions and opposing votes by important States (p. 166). He implicitly supports the idea of retributive justice for excessive profits and *enrichissement sans cause* (pp. 260-9). He ascribes an exclusive right to host countries to regulate foreign enterprise (p. 278), but considers that the present state of affairs does not allow one to look for a binding code on TNCs (p. 285). The principle of common heritage prohibits unilateral exploitation of the deep sea-bed (pp. 335-6). A substantial chapter on development agreements and technology transfer concludes with the observation that failure to achieve a code on technology transfer would have disastrous effects (p. 397). He supports improvements of participatory equality within the IMF, though proposals remain moderate. They do not seek a 45 per cent share of LDCs, as envisaged by the Group of twenty-four. Instead, he suggests the establishment of regional monetary groups (p. 442), and supports a link of the Fund to development by allocating SDRs to development agencies (pp. 455-62)—a proposal which is now likely to be replaced by a renewed role of the World Bank Group (1985 Baker Plan). Finally, the flow of official development aid (ODA) needs to be increased up to at least the standard objective of 0.7 per cent GSP (p. 444). ODA, again, has to become the main instrument of co-operation (p. 453), and should be secured by the establishment of International Development Funds, possibly administered by IDA and other existing bodies (pp. 454-5).

Conceptually, the most interesting part of the book relates to the function of equity. The author correctly maintains that equity plays an important role within NIEO. He reviews traditional functions of the concept in national law and international law (pp. 180-93) and then applies it to the realm of NIEO. Two different, new functions are

distinguished. *L'équité harmonatrice* is used as a basis for rules which provide a better response to the facts of interdependence (pp. 193-6). And *l'équité compensatrice* serves as a basis to realize differential and preferential treatment of developing countries on a non-reciprocal basis; to move a purely formal concept of equality towards one of substantive or material equality (pp. 197-240). The concept of Generalized System of Preferences (GSP), as authorized under GATT, is correctly dealt with under that heading. Equity has emerged as an important foundation of non-reciprocal relations in trade and elsewhere, such as in the regime of deep sea-bed mining of the 1982 Convention on the Law of the Sea. It serves as a justification for all kinds of preferential treatment, affirmative action or positive discrimination to the benefit of LDCs. Yet, and regrettably, the author makes no effort to show how traditional notions of equity, as applied to particular cases, can be readily transferred, as a legal concept, to the different levels of legislative rule-making. An effort to establish such links is all the more necessary since the author seems to adhere to traditional static, but controversial, views on equity. To him, there is no fundamental difference between equity and decisions *ex aequo et bono* (Article 38 (2), ICJ Statute), neither is it a general principle of law, nor a formal source of international law (pp. 184-91). The reviewer doubts whether such a static perception of equity can serve as a basis for new and dynamic functions within NIEO. It would certainly be more useful to emphasize existing dynamic aspects of equity in the legal process. Also, no attention is paid to the problem that equity and fairness have been invoked to defend existing rights and legitimate expectations. A research effort into such dilemmas of equity (Schachter) and its potentials as a basis for desperately needed compromise, as outlined in the 1974 *Fisheries Jurisdiction* cases, would perhaps have well served the purpose of the study, which the author expressly dedicated to the determination of appropriate means and methodology in order to make international law a more effective instrument for the achievement of a new economic order (p. 3).

The author does not suggest and submit a complete treatise on NIEO. Given the complexities of problems, such a task could indeed hardly be achieved. Thus various areas of contemporary interest remain without discussion. The problems of commodity agreements and attempts at comprehensive regulation (Integrated Programme for Commodities, Common Fund) are omitted, though a brief review of STABEX and SYSMIM of the Lomé Conventions is given (pp. 237-40). Equally, crucial issues of protectionism and non-tariff barriers and other subjects addressed in the MTN Codes of the Tokyo Round remain untouched. Finally, newer developments towards collective self-reliance—an increasingly important aspect of the NIEO movement (1979 Arusha Programme for Collective Self-Reliance)—remain outside the scope of the study. These omissions do not reduce the merits of the book, though they may affect its timeliness to some extent. The enormous field covered still provides ample information on many aspects of NIEO which remain to be settled. As seen before, the volume discusses an impressive variety of subjects, primarily reflecting doctrinal writings and also positions of the Catholic Church. It is richly annotated and accompanied by an extensive and helpful bibliography. All this renders the book a helpful research tool.

This strength, however, perhaps also causes the main weakness of the study. It remains fairly general and reveals, as do many other legal studies on NIEO, that the matter can hardly be approached any longer by limitation to legal aspects (as the subtitle indicates) but requires interdisciplinary treatment. The lawyer dealing with NIEO and economic law in general faces the problem that, ultimately, reasonable solutions depend on economic and social analysis. Without commanding these tools, progress and innovation are increasingly difficult to achieve. The lawyer's role is either at the very beginning when basic valuational goals are to be defined and extracted from State practice, or at the other end, when policies are to be framed in terms of legal rules and regulation. Neither side is particularly emphasized in the study.

On the one hand, the author takes the view that proposals for detailed regulations would be premature (p. 3). This may explain the absence of close examination of State

practice. The important issue of the legal qualification of CERDS is, for example, dealt with only briefly, and the author holds that this constitutional instrument has 'bel et bien une grande signification juridique et politique' (p. 340). Discussion of judicial reasoning, for example in the field of compensation for nationalizations, is equally marginal. In general, little attention is paid to the case law. This may possibly stem from the view that international economic law, defined as *un droit de finalité, droit mobile* and *réaliste*, is fundamentally different from traditional international law, and held suitable neither for the process of customary law (pp. 149-50) nor, in general, for judicial dispute settlement (pp. 15-23). Closer examination of reality might indicate that the difference is not all that big. It might teach more differentiated lessons on the functions of custom in economic law and on justiciability of disputes in the field than the theory discussed by the author suggests.

On the other hand, equally little progress is achieved in the clarification of basic values and goals of NIEO which may provide a guide-line and framework to economists and policy-makers. This is particularly true of the notion of development which provides the ultimate perspective and foundation of NIEO and all regulation of North-South economic intercourse. The book does not adequately respond to this crucial task of clarification. Statements remain fairly general and abstract. Thus the right to develop is defined in terms of the total of principles, rules and institutions aiming at the eradication of underdevelopment and which tend to ensure for man and peoples the respect of their human rights (p. 144). Little is gained here in operational terms. More detailed analysis of existing instruments, in particular the second and third development strategies of the UN of 1970 and 1980, respectively, may have provided further insights into basic values and goals of development gradually emerging by international consensus on the basis of human dignity.

All in all, the study hardly breaks new ground. Conclusions remain short (pp. 463-4) and scarcely offer further avenues. The merits and qualities of this extensive volume lie in description, information, discussion and assertion of existing views. The book once more reminds that, in a field of rapid transition, it may be more useful to apply, both in practice and in theory, a topical approach rather than to embark on a general and necessarily somewhat brief treatment of so many subjects at the same time. More may be gained for a desperately needed restructuring of international economic relations and the epochal objective of stopping an ever-increasing gap between North and South on the basis of consensus and compromise.

THOMAS COTTIER

Encyclopedia of Public International Law. Volume 8: Human Rights and the Individual in International Law. International Economic Relations. Published under the auspices of the Max Planck Institute for Comparative Public Law and International Law, under the direction of RUDOLF BERNHARDT. Amsterdam: North Holland Publishing Company, 1985. 551 pp.

This is a volume full of interest, and it seems invidious to select only a few of the many entries for comment.

There is a good treatment of the African Charter on Human and People's Rights by Judge Mbaya, with some temperate but well-justified reservations about the paucity of practice. The piece on the Property of Aliens, by Seidl-Hohenveldern, is rather short and conventional, and therefore does not raise some of the current, central issues such as whether aliens can claim directly on the basis of treaties which establish standards of treatment for alien property, or whether a claim for loss of future profits is a legitimate head of claim in the event of expropriation (these are very much controversial issues

before the US-Iranian Claims Tribunal at this time). Fortunately, there is an excellent entry by Dolzer on Expropriation and Nationalization in the same volume which remedies these omissions.

Meessen contributes an excellent, and very up-to-date, article on Anti-Trust Law, noting the US-Canada Memorandum of Understanding of 1984 as a constructive way forward (though only time will tell whether these consultative techniques work to eliminate disputes).

The entries on Nationality are very thorough. This is true of Bernhardt's entry on German Nationality and also of Plender's article on British Commonwealth Subjects and Nationality Rules; it is also true of Randelzhofer's more comprehensive treatment of Nationality. He expresses some useful words of caution about extrapolating too much from the *Nottebohm* case, though he does not directly link this to the treatment of dual nationality in relation to diplomatic protection by the US-Iranian Claims Tribunal in Case A.18. There, it will be recalled, the Tribunal followed the *Mergé* case (consistently, in their view, with *Nottebohm*) to allow a claim by a dual national against Iran, the State of the 'ineffective' nationality of the claimant.

Petersmann contributes a good, but very critical, article on the Charter of Economic Rights and Duties of States, and there is a detailed entry on Economic Law by Jackson. Fischer's treatment of Concessions is also good, though marred by the rather uncritical acceptance of the *pacta sunt servanda* principle, by analogy with the law of treaties. And the entry on Commercial Arbitration by Cremades is rather brief, too brief, in fact, to do justice to this important topic.

The coverage of the European Convention on Human Rights in three articles by van der Meersch, Frowein and Norgaard is exceptionally good; it is quite the best short treatment of the topic this reviewer knows. In contrast, the entry on African Developments in Human Rights by Bello is biased and unrealistic. The treatment of the American experience (the Inter-American Court and Commission) in two articles by Farer and Buergethal is of a far higher standard and very informative.

One or two entries are surprising, in the sense that one would not have expected them to have found a place in the volume (e.g. Missionaries, and the *Joyce-DPP* case), but, all in all, this is a most useful volume.

D. W. BOWETT

Effets juridiques de la sentence internationale. By A. EL OUALI. Paris: Librairie Générale de Droit et de Jurisprudence, Pichon et Durand-Auzias, 1984. 321 pp. 240 F.

This work rejects the received wisdom that the execution of an international judicial decision is an exclusively political act: El Ouali argues that such a decision can have direct legal effects in the municipal systems of the States party to the litigation. The book does not deal solely with International Court jurisprudence, but, for instance, discusses the *Channel* arbitration and contains a good account of the *Socobelge* case.

Essentially, El Ouali's argument is that an award, rendered in inter-State litigation pursued under international law, creates a norm binding on the litigant States. Where this norm requires no municipal legislation to give it effect in the litigants' municipal legal orders, then it is self-executing and has direct effects in these systems. Declaratory judgments, which define a legal state of affairs, are of this nature.

Such norms are not identical with the scope of *res judicata* which attaches to decisions: the latter has a more limited scope in that it binds only the States party to the decision with respect to the *dispositif*, as this is interpreted in the light of the *motifs*. El Ouali argues that individuals can invoke international decisions indirectly in domestic litigation, by way of the self-executing norms which international decisions may generate.

This idea entails that such norms have binding force for municipal courts, but there is

contrary State practice. For instance, in the *Mackay Radio and Telegraph* case (1954), 21 ILR 136, *American Journal of International Law*, 49 (1955), p. 413, the Tangier Court of Appeal of the International Tribunal refused to follow the *US Nationals in Morocco* case, *ICJ Reports*, 1952, p. 176, preferring to base itself on the dissenting opinions in the latter. Although El Ouali notes *Mackay Radio and Telegraph*, he distinguishes it on the ground that *US Nationals* was an interpretative judgment which only bound the litigant States and not their nationals. This seems to be unconvincing within his own terms, inasmuch as it relies on the identity of the parties—and thus indirectly, *res judicata*—and not the norm which El Ouali claims arises from an international decision. Further, almost invariably all international decisions contain some interpretative element, but if these are not binding on actors other than the States party to the litigation, then very few international decisions could have direct municipal effects.

The volume falls into two parts: the effects which an international decision has in the international legal order, and its effects in the municipal orders of the litigant States. Both sections are very tightly structured: on the whole, the first section is more satisfying than the second, being more focused and rigorous. This is not to imply that it does not contain arguments which may be disputed—for instance, some may well dissent from El Ouali's view that arbitrations between States and individuals are not international judicial decisions, but even they must concede that his analysis is thought-provoking.

The first section has the aim of setting the parameters and laying the groundwork for the second, but this causes El Ouali to exclude from his analysis some questions which might legitimately be thought worthy of inclusion. For instance, El Ouali argues that, by definition, *res judicata* must attach to international decisions, and thus he excludes advisory opinions from his analysis: it would have been preferable had this been done by exclusionary and not definitional stipulation. Not only is it counter-intuitive to hold that advisory opinions are not international decisions simply because of their lack of formal binding force, but this is contrary to practice. Not only because of the constant reiteration by the International Court since *Eastern Carelia* (1923), *PCIJ*, Series B, No. 5, that in exercising its advisory competence the Court must not depart from its judicial function, but also, for example, the 1962 *South West Africa* case, *ICJ Reports*, 1962, p. 319 is predicated on the discussion of the binding nature of advisory opinions in subsequent related contentious proceedings which was presented in the pleadings. Surely El Ouali could have incorporated advisory opinions in his analysis on the same basis as contentious cases—that advisory opinions create norms which may produce municipal effects. Theories ought not to be built on the back of definitions, especially when there is contrary empirical evidence.

The second section develops El Ouali's theory of direct municipal effects. This has a looser structure and some subsections seem superfluous. At one point he engages in a theoretical discussion which is misplaced and rather restricted in the jurists invoked (Dabin, Hart, Kelsen, Villey, Wróblewski). Satisfactory theory cannot be constructed by quoting a few authors in the hope that the extracts hang together—especially when they adhere to diverse and opposed core ideas. There is also a fairly detailed examination of the use of force as a sanction against the non-implementation of an international judicial decision: this can only have historic interest, and its relevance to the rest of the book is marginal. Also, his discussion of League Council powers in this regard must be qualified, as El Ouali ignores the effect of the *Interpretation of the Treaty of Lausanne Article 3 (2)* advisory opinion (1925) *PCIJ*, Series B, no. 12, which introduced the qualified unanimity rule, whereby the disputants' votes were not counted for the purpose of ascertaining whether unanimity had been reached in the Council.

An interesting methodological point is that, in establishing his thesis that international decisions have direct effects in the municipal legal orders of the States party to the litigation, El Ouali relies on the jurisprudence of the European Court of Justice. Although it might be thought that the reasons why ECJ jurisprudence has direct effects in the municipal legal systems of member States are too closely tied to the Treaty of Rome and

a degree of integration greater than that normally obtaining in general international law for this jurisprudence to have a wider import, El Ouali shows that it can be a useful source of analogy, if used carefully and critically.

It is much easier to criticize than to praise, but it is hoped that this review does not detract from the fact that this is an interesting and wide-ranging book, although its conclusions are of a very narrow scope—the direct effects of international inter-State litigation in the municipal legal systems of the litigants by the generation of self-executing norms. This means that the thesis can only take account of declaratory judgments which determine a legal state of affairs. The exegesis of this argument means that the book excludes material which is relevant to the wider question of the effect of international decisions—the ‘hot oil’ cases, the execution of ICJ decisions in broad and general terms, and what international organizations do with advisory opinions. Some such general overview might be preferable, but, on the other hand, by not adopting the more obvious and orthodox line of analysis, new ground is broken.

Apart from questions of substance, there are other omissions—what is lacking from this complex book is an index; what was lacking was a competent proof-reader. But it would be misleading to leave the impression that this book is good, but only good in parts: it is worth reading because it adopts a new approach which is consistently thought-provoking, even though some of its premisses and conclusions may not be beyond criticism.

IAIN SCOBIE

Minorities: Community and Identity. Edited by C. FRIED. Berlin, Heidelberg, New York, Tokyo: Springer-Verlag, 1983. viii + 417 pp.

The problems relating to minorities are of particular interest to international human rights lawyers, although repercussions of these problems will certainly affect other areas of international law. Analysis of this subject is therefore important, particularly in the light of United Nations neglect.

This book consists of twenty-eight short papers which examine the subject from different perspectives. They are written, however, principally by social scientists and, as a lawyer, this commentator is unable to judge the scientific merit of the papers. This commentary will therefore be written from the point of view of the work's usefulness to international lawyers. The major shortcoming for the lawyer is that a significant number of these papers are written in a way which is difficult to digest, principally because of their use of jargon. There are others, however, which are straightforward and easily readable. The book as a whole has thus a disjointed feel to it, there being such a large number of short contributions. It would be of greater use, in fact, if the major themes of the book could be arranged in a consecutive fashion and expressly written for the non-scientist.

However, despite these shortcomings, the book has its merits. The overall impression one has is that the issues involved in minority protection are nowhere like as straightforward as might be thought. As is to be expected, the scientists are frequently not in agreement with each other either. The majority of studies are centred on experiences in the US, England and Germany. One contribution (Heckmann) points out the different meanings of the word ‘minorities’ and gives a useful description of the different types of minorities, principally by reference to their origins. Needless to say, the needs of these different types are not all the same. The subsequent paper (Patterson) then appears to challenge traditional assumptions by indicating the extent to which the existence of an ‘ethnic’ group depends on a state of mind, and his attitude towards ‘ethnicity’ is somewhat negative as, in his view, it encourages the majority to oppress the minority. However, this seems to ignore the fact that discrimination is often the factor that caused the minority group to mobilize initially. More common assumptions are convincingly questioned by Wallman who, using research conducted on minority groups in South London, points

out that ethnic identity is neither a singular nor a fixed commitment and that the encouragement of other identity options, e.g. work or local community, would be very beneficial. A factor which is very important for minority success is that of language, not only when the minority language is foreign (e.g. Turks in Germany-Hopf), but also when it is the same (Gumperz). Of greatest direct interest to the human rights lawyer are the themes of political representation, express minority protection and the situation where there is a clash of human rights values. One paper on the constitutional protection of minorities in Canada promised from its title to be interesting, but although it briefly relates Canadian experiences with regard to the provision or otherwise of protection for the French language, the paper is bereft of interesting analysis. With regard to political representation, what does this right mean for minorities? Thernstrom points out how difficult this question is, as well as the difficulty of drawing the dividing line between disadvantage and discrimination. Should minorities be expressly protected by a Constitution? Kitromilides, looking at the example of Cyprus, has his doubts, and his reasons mirror to some extent those of Patterson. Disagreement is also shown over the correct policies of affirmative action, and again here the attitudes of the majority are important. Finally, the protection of minority culture may well be very detrimental to the human rights of the minorities themselves, as studies on the problems of Turkish women in Germany show (Wilpert). Space precludes a consideration of the other interesting issues studied in these papers.

This commentator's conclusion is that human rights lawyers with time and patience will extract a number of thoughtful insights in this collection, but it is not concentrated and concise enough to interest other international lawyers.

LOUISE DOSWALD-BECK

L'Exploitation des ressources minérales des fonds marins: législations nationales et droit international. By VALÉRIE GAME DE FONTBRUNE. Paris: Éditions A. Pedone, 1985. xi + 218 pp. 180 F.

As Professor Virally points out in his preface to this book, the enactment of national legislation concerning the exploration and exploitation of deep sea mineral resources raises the problem of their lawfulness and compatibility with the regime established in this respect by the 1982 Convention on the Law of the Sea. Although a lot has been written about the latter, no comprehensive study has yet dealt with its relationship with the former.

Part I of this monograph is a comparative analysis of the purpose, scope and regime established by the national legislation of the US, the Federal Republic of Germany, the UK, France and the USSR. These laws have common points: they are all temporary, pending the entry into force with respect to the State concerned of an international convention (p. 35). They all prohibit citizens of, and companies incorporated in, the State concerned from engaging in activities of exploration or exploitation (the latter not to begin until 1 February 1988), unless authorized by a licence issued by that State (pp. 60-8) or by one of the 'Reciprocating States', e.g. a State recognizing such licences and enacting similar legislation (pp. 116-22).

The need for mutual, recognition of licences under national law has led to the adoption of the 1982 'Mini-Treaty' concluded between France, the Federal Republic of Germany, the UK and the US. It sanctions the Reciprocating States system and provides for settlement of disputes in case of overlapping claims under the national laws of the parties (pp. 122-9).

Part II deals with the lawfulness and compatibility of these laws with international law: this leads to the interesting question of the legal value of the common heritage of mankind concept and its incorporation in the 1982 Convention. Like most lawyers from developed countries, the author distinguishes between the concept itself, which in her

opinion is largely accepted, and its content concerning the special regime as introduced in the 1982 Convention. Total disagreement exists in respect of the latter between industrialized and developing countries (p. 159). In this regard, national legislation constitutes subsequent contrary practice to the 1970 UN General Assembly Declaration of Principles, according to which States should refrain from engaging in deep sea mining activities except under a regime contained in a generally accepted treaty. As such, these laws have impeded this system from becoming customary international law (p. 165). It follows that, unless the Convention enters into force and a given State becomes a party to it, exploration and exploitation by this State of the mineral resources of the deep sea-bed is governed by the freedom of the seas principle.

Yet delicate questions may arise for States like France, which, on the one hand, have signed the Convention and are thus bound by Resolutions I and II concerning protection of preparatory investments; on the other hand, they have enacted unilateral legislation regulating such activities (pp. 204-7). This is why the author's statement, according to which signature has no legal effect (pp. 204-5), should be tempered in order to take into consideration the obligation of good faith to refrain from acts which would defeat the object and purpose of the treaty (Article 18 of the Vienna Convention on the Law of Treaties).

It is further submitted that there is no real incompatibility between the national legislation and the conventional regime contained in the 1982 Convention. That is so because the former measures contain a number of provisions aiming at a harmonization with the Convention: thus, for example, they introduce a levy, which, if the State concerned becomes a party to the Convention, will be used for its contribution to the International Authority (p. 174). That is true. Yet, this statement completely disregards the big discrepancy between the national legislation and the Convention. The levy imposed by the legislation is much lower than that envisaged in the Convention and there are no transfer of technology provisions, just to mention some of the differences.

Dr Game de Fontbrune's study is constructed very well, thoroughly researched and based on solid legal reasoning. It certainly fills a gap in the field it deals with. But this is a book which reflects the position of the industrialized countries and, although the reader is happy to find much evidence and documentation supporting such a view, a more exhaustive discussion of the developing countries' arguments would have been most welcome.

HARITINI DIPLA

The Refugee in International Law. By GUY S. GOODWIN-GILL. Oxford: Clarendon Press, 1983. xxvi + 318 pp. £9.50.

International efforts to alleviate the plight of refugees must be one of the best examples of actions based on true humanitarian concern, generally unsoiled by subjective political interests and mere lip-service which so often accompany other human rights activities. The fact that international machinery, both under the League of Nations and under the UN, is effectively able to pursue its mandate proves the overwhelming need felt by States to deal with the problem. Conversely, the same facts also prove that there are major difficulties involved. In this context, Goodwin-Gill's work represents a major service by providing in one book a comprehensive survey of the international law applicable to this subject, which in other books tends to be treated as a subsidiary issue, if dealt with at all. In this book, the author examines not only the relevant international law, but also UNHCR practice as well as municipal practice.

The major part of the book is divided into three sections: the first deals with the question of definition and status of the refugee; the second with the principle of *non-refoulement* and the grant of asylum; and the third with the actual protection accorded to refugees. In all the issues which arise in these sections, the author presents relevant treaty law and municipal law practice, and attempts to make an assessment of the position in

international customary law. The last task he undertakes with admirable care, admitting the problems involved and not falling into the trap of rash enthusiasm shown by too many human rights lawyers. He therefore presents a very convincing conclusion that the duty of *non-refoulement* and certain fundamental human rights, e.g. right to life, freedom from torture or inhuman treatment, are to be accorded to refugees. In no way, however, is all this information presented in a dry, indigestible manner. On the contrary, Goodwin-Gill's refreshing conciseness is matched by his thoughtful consideration of the legal and practical problems that are involved with regard both to individual refugees as well as to cases of mass exodus. Occasionally one wishes, however, that some areas of particular interest could have been looked at a little more deeply, for example, the problem of the political offence and extradition. Practice of the European Convention could have been referred to in relation to extradition cases, which are usually considered under Article 3 (inhuman treatment). A particularly fascinating area is that of definition, especially when it involves persons who do not wish to return to their country of origin because of general human rights abuses. As the author states, 'not every failure to promote and protect . . . the various rights recognized by the 1966 Covenants will justify flight across an international frontier and a claim to refugee status. Not all the rights are fundamental . . .' (p. 46). How does one make such an appraisal? Outside obvious cases of torture or murder, States of different ideologies will have different ideas. The definition of a refugee in the 1951 Convention includes the fear of being persecuted for reasons of race, religion, nationality, social group or political opinion. Ought this not to include those who might wish to flee from the abhorrent practices against women in many countries even though the category of 'sex' is sadly excluded? These are just some of the many areas which could be further explored. However, the wish not to delve too far in some areas is understandable in order to achieve conciseness, and at the same time the consideration, to a limited degree, of a large number of problematical areas stimulates thought in an effective way. Finally, the last part of the book reproduces, in the form of Annexes, the texts of the relevant treaties (and States parties to the most important of these), as well as a list of selected UN General Assembly resolutions.

Goodwin-Gill recognizes that the problem of refugees is intimately connected with the giant tragedy of human rights abuse, which is not so easily dealt with. In the meantime, however, States need to provide effective legal measures to protect refugees, and in this respect this commentator agrees with the author's criticism of UK practice (p. 147). Further, and most importantly, international care must be continued and enhanced. 'The success of local integration schemes will naturally be enhanced by international assistance, reflecting the responsibility of the international community at large to lighten the social, political and economic problems faced by receiving States' (p. 222). One can only agree, and the same is true for all solutions looked for.

LOUISE DOSWALD-BECK

The Spirit of Uppsala: Proceedings of the Joint UNITAR-Uppsala University Seminar on International Law and Organization for a New World Order. Edited by ATLE GRAHL-MADSEN and JIRI TOMAN. Berlin, New York: Walter de Gruyter, 1984. 601 pp. DM 118.

'Impression gave way to thought; and thought led to further thought; one added to another in a chain reaction.' These words are quoted from the preface to the *Proceedings of the Joint UNITAR-Uppsala University Seminar on International Law and Organization for a New World Order* presented in this volume. They characterize the methodology of this seminar. This methodology should be the guide for all further discussions about a new world order. In these discussions certain cherished ideas of traditional thought in international law are being questioned. This inquiry will be governed by questions such

as: what rules may guide nations in their mutual relations, their co-existence and their co-operation? How can we find the right measure of equity and equality? How can we build a true community of goodwill among States and how should the community of nations be organized, in order that the peoples of the world can live together in peace and under conditions where the elementary needs of all members of the human race will be satisfied? The object of this seminar, opened by His Majesty King Carl Gustaf of Sweden, was to try to find some answers to these questions by bringing together leading international scholars to a 'brainstorming' session. The participants came from fifty nations representing all political systems; they were not only international lawyers from universities, but also practising lawyers in responsible positions of international and national organizations, judges, ambassadors, attorneys and legal advisers.

The seminar was designed to allow and to ensure an active role for all participants. A General Rapporteur—Professor W. M. Reisman, Yale University—and five Rapporteurs were selected. They represented all major regions of the world and their task was to digest the results of the collective effort and to contribute their own views as influenced by the common experience of the seminar. The six different scholars with different backgrounds perceived the problems in different ways. This explains why there are sometimes discrepancies between their reports, but as Atle Grahl-Madsen put it in the preface, 'Better understanding, not consensus, was the goal'.

The different working groups discussed the following subjects: 'International Law in a Multicultural World' (Report by Taslim O. Elias, pp. 46–52); 'Independence and Interdependence' (Report by Endre Ustor, pp. 52–8); 'Sovereignty and Humanity' (Report by Herman Montealegre, pp. 58–63); 'International Organization for a New World Order' (Report by Mustafa Kamil Yasseen, pp. 63–72); 'Legal and Organizational Problems of Mini-States' (Report by Philip K. A. Amoah, pp. 72–9). Within the working groups the great number of different papers distributed by all the participants reflects the pluralistic approach of this conference and the very fruitful combination of scholars and lawyers practising international law in responsible positions. It is not possible to mention all the papers presented in the working groups. Of special interest to this reviewer were the papers by Thomas M. Franck, 'Growth of the International Community and Qualitative Shift in International Legal Relations: The View from the United Nations' (p. 214); Yasuhiko Saito, 'International Law as a Law of the World Community: World Law as Reality and Methodology' (p. 233) and the paper presented by Otto Kimminich in the working group 'Independence and Interdependence' under the title 'Material Economic and Human Limits to the Activities of Mankind: Legislating for a New Economic World Order in an Ecological Context' (p. 314).

The general papers presented during the conference dealt with subjects like 'International Law of Our Times' (Atle Grahl-Madsen); 'Can World Order be Negotiated?' (Göran Ohlin); 'A New International Law for a New World Order' (Erik Suy); 'Changes in the Norms Guiding the International Legal System—History and Contemporary Trends' (Bo Johnson Theutenberg); 'International Law and Organization for a New World Order' (Hans Blix); 'International Law and the Categorical Exigencies of a World in Dramatic Transition' (Juan Carlos Puig); and 'Global Transformation: Search for a New Understanding' (Soedjatmoko).

The fruits of the ten days' conference are summarized in the General Report given by Professor Reisman. This report is far more than simply an account of the proceedings. It is rather 'an individual statement' (Reisman) for which the author has 'drawn freely on the ideas of many of our members'. This general report is a most fascinating piece of work in the modern literature of international law. The chapter 'Goals for a New World Order' characterizes the inadequacies and hopes of international law. In the second chapter he discusses the realities of international law and presents some of the ideas of the participants of the conference for improvement. In the last chapter Reisman speaks about 'Components of a World Public Order' like self-determination, human rights, wealth and environment. In conclusion he urges more extensive teaching of international

law in the law schools, 'because international lawyers must play an even larger role than in the past in the redesigning and refinement of world order' (p. 44).

Certainly the conference has been a valuable contribution to the development of modern international law. To participate in this 'brainstorming' by reading the book containing the Proceedings of the Uppsala Conference would be salutary for every international lawyer.

HANS-JOACHIM MENGEL

Commentaire du Règlement de la Cour Internationale de Justice. By G. GUYOMAR. Paris: Éditions A. Pedone, 1983. 760 pp. 400 F.

This work remains the most complete and thorough exposition of the application of the Rules of Court in existence and, as such, it is an indispensable work of reference. The last edition appeared in 1973, so that a new edition was necessary to take account of the new 1978 Rules.

The scope of the book's coverage is very large, but two of the most important recent developments are worth singling out. The first is the use of Chambers. The author notes that the US/Canada *Gulf of Maine* case provided the first opportunity for the use of the new Chambers, and the book gives a good account of the rather strange developments which followed from the agreement between the parties as to the choice of the judges to sit on the Chamber (at pp. 70-1). As she points out, there is a potential conflict between the free choice of the parties and the terms of Article 17 which indicate that it is for the Court to constitute the Chamber 'with the approval of the parties'. But if, as in that case, the parties were adamant about their choice, and would prefer *ad hoc* arbitration to a Chamber constituted otherwise than in accordance with their choice, the Court has little real choice except to accommodate the parties. But the system which requires judges nominated by the Court to retire as a consequence of the nomination of an *ad hoc* judge by a party is clearly an unfortunate one.

Unhappily, the story does not quite end there. The dissatisfaction of the Court with this result seemed to continue and to affect the actual conduct of the proceedings before the Chamber, at least to the extent that the parties were made to feel that, before the Chamber, they were privy to a 'second-class' litigation, and schedules must be adjusted to suit the full Court rather than the Chamber. In the event, a good deal of resentment was caused by the Court's handling of these matters of schedule, and the result was not one calculated to encourage States to opt for a Chamber.

The second development is the assertion of a right to intervene. The author gives an excellent, and detailed, account of the practice under Article 81. She cites extensively from the proceedings in 1981, when Malta attempted to intervene in the *Tunisia-Libya* case, and rightly points out that the Court's rejection of Malta's request was restrictive, but understandable given that the matter came before the Court under a *compromis* to which Malta was not a party. The subsequent refusal by the Court, in 1984, to allow an Italian intervention in the *Malta-Libya* case is not, of course, noted in this edition. Nevertheless, the question now is 'in what circumstances is there a right of intervention'? There is little hint of the answer to that question in the present edition, but perhaps the author will attempt one in the next.

D. W. BOWETT

Maritime Boundary. By S. P. JAGOTA. Dordrecht: Martinus Nijhoff, 1985. xx + 388 pp. (including annexes and bibliography). £48.50.

This work is an expanded and updated version of a series of lectures which Dr Jagota delivered at The Hague Academy of International Law in 1981. Dr Jagota is eminently well qualified to write on the subject of 'Maritime Boundary', in the light of his experience as legal adviser to the Indian Ministry of External Affairs in New Delhi, as leader of the

Indian delegation to the UN Conference on the Law of the Sea (UNLOSC), and as a former member of the International Law Commission. His study deals with the outer limits of maritime zones (the territorial sea, the exclusive economic zone (EEZ), and the continental shelf), but concentrates particularly on the delimitation of maritime zones as between States with opposite or adjacent coasts. It is this latter aspect of the study which will be of particular interest to international lawyers, given the number of delimitation disputes which have already arisen or which are bound to arise following upon the greatly increased range of coastal State jurisdiction conferred by the EEZ concept and by the recognition that the rights of a coastal State over its continental shelf may extend seawards to the outer edge of the continental margin.

Dr Jagota's survey of the delimitation problem covers the period between 1945 and 1983 (with an addendum covering developments up to November, 1984, including the judgment of the Chamber of the ICJ in the *Gulf of Maine* case between the US and Canada). It includes an analysis of State practice as reflected in over 100 bilateral agreements fixing territorial sea boundaries, continental-shelf boundaries and more general maritime boundaries, a description of six leading judicial, arbitral or other decisions (the *North Sea Continental Shelf* cases, the *UK-French Continental Shelf* arbitration, the *Beagle Channel* award, the *Aegean Sea Continental Shelf* case, the *Jan Mayen* conciliation report and the *Tunisia-Libya Continental Shelf* case), and an account of the negotiations on delimitation at UNLOSC leading up to the adoption of Articles 74 and 83 of the 1982 UN Convention on the Law of the Sea.

The analysis of State practice is useful and illuminating. Dr Jagota draws from it the conclusion that, in a large majority of cases, negotiating States '... have been satisfied that the median or equidistance line leads to an equitable solution or result' but that 'they have also been ready to negotiate an equitable solution by modifying the median or equidistance line or by adopting a new line if special circumstances in the area so required it' (p. 121). He identifies some of the special circumstances leading to the adoption of a modified median line or a negotiated line, namely (1) the presence of islands, particularly if title thereto is disputed or if they are located on or near the median line, or on the 'wrong' side of the median line; (2) the concavity of the coast; (3) comparable length of coast in the delimitation area; (4) geomorphology; (5) location of resources and structures; and (6) traditional fishing rights or rights under an existing agreement (p. 123).

The survey of international case law (in Part III) is more descriptive than analytical. Despite the acknowledged difficulty of seeking to extrapolate from the existing case law the factors which an international court or tribunal may take into account in delimiting a maritime boundary in accordance with equitable principles, the attempt could have been made. In particular, one would have welcomed the author's views on such matters as the significance of natural prolongation as a geological or geographical concept, the weight to be attached to the circumstances of geography and coastal relationships, the effect to be given to offshore islands, and proportionality. It is in any event unfortunate that Dr Jagota had completed his manuscript before the seminal judgment of the ICJ in the *Libya-Malta Continental Shelf* case, delivered in 1985, and before the award of the Court of Arbitration in the *Guinea-Guinea-Bissau* case, also delivered in 1985. This is one of the drawbacks in writing about a subject such as the delimitation of maritime areas, where the law is in process of continuing evolution.

Dr Jagota has none the less performed a valuable task in collating systematically the materials necessary for an evaluation of the present state of international law on the delimitation of maritime zones. If he is cautious in making his own evaluation, this is primarily because international courts and tribunals have increasingly emphasized the point that each delimitation must be effected on its own merits, taking all relevant circumstances into account. In this field, flexibility has been deliberately sought and obtained at the expense of legal certainty; it is no wonder that commentators eschew any definition or even enumeration of 'equitable principles'.

The annexes include a list of the 100 or more delimitation agreements surveyed, the

texts of the relevant articles of the 1982 UN Convention on the Law of the Sea, and a full bibliography.

IAN SINCLAIR

International Organisation and Integration. Volume II.K: Functional Organisations and Arrangements. Edited by P. J. G. KAPTEYN, R. H. LAUWAARS, P. H. KOOIJMANS, H. G. SCHERMERS and M. VAN LEEUWEN BOOMKAMP. Dordrecht: Martinus Nijhoff, 1984. £76.50.

This is a further volume in a valuable collection of documents entitled *International Organisation and Integration*, and is the second edition of a single volume of that title published in 1968. This edition runs into several volumes, and the one reviewed here adds to the collections already published dealing with the UN, its specialized agencies, the European Community and various regional arrangements.

This volume is entitled *Functional Organisations and Arrangements*, and its title indicates that not only constitutional documents are reproduced, but also some law-making treaties. A number of disparate subjects are covered, their only point in common being that each group attempts to deal with a particular problem, or law-making area. Thus the volume comprises arrangements dealing with private international law; humanitarian law; terrorism; commodities; environment; fisheries; international watercourses; satellites and space co-operation. Human rights conventions are also included in the list of contents, but in fact these only include some ILO and UNESCO conventions, the major human rights conventions being reproduced in other volumes. The space co-operation heading is also very limited, reproducing only the Convention for the Establishment of a European Space Agency 1975, the Treaty on Outer Space being included in the volume on the UN system. Each area dealt with, with the exception of human rights treaties, has a short introductory commentary, which is generally interestingly and usefully written, and these are printed together at the beginning of the volume. The excellent introduction to the two 1977 Protocols on humanitarian law, written by Fritz Kalshoven, in some way compensates for the limited treatment of humanitarian law in these volumes, and he further adds, as footnotes to certain articles, the corresponding articles of the Hague Regulations of 1907. Not much extra space, however, would have been taken by reproducing other key treaties such as the Hague Regulations themselves, the Geneva Gas Protocol 1925 and the 1981 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.

In addition to the documents, extensive tables are provided indicating ratification or membership of treaties or organizations as at May 1984, but there is no indication of reservations or statements of understanding; these would, admittedly be difficult to include for reasons of space and complexity.

The principal use of this volume is as part of the overall collection. The topics included in the volume are too disparate, with only the few major treaties being included under each heading, to be of great use to a specialist in any of these areas. In the foreword to this volume, Louis Sohn writes: 'The 1968 edition of that collection had been a constant travel companion for more than ten years . . .'. The sheer size of this edition, running into several large volumes, makes this now unfortunately quite impossible. As a reference collection, however, it will make an excellent office or library companion.

LOUISE DOSWALD-BECK

The Law and Organisation of International Commodity Agreements. By KABIR-UR-RAHMAN KHAN. The Hague: Martinus Nijhoff, 1982. xxv + 416 pp. (including bibliography and index).

The collapse of the International Tin Council in October 1985, and its consequent inability to fulfil its legal obligations to private banks and commodity brokerage houses,

has raised a host of legal questions with no clear solutions. As the writs have started to fly, so has the search for lawyers who are able to answer questions on the legal personality of international commodity organizations, on the relationship between the organization and its members (with particular reference to the latter's responsibility for the former's debts), and on the immunity of such organizations from municipal courts (and whether they are engaged in sovereign or commercial acts).

Some of these questions are addressed in this work, which mysteriously seems not to have been reviewed in any of the leading international law journals and which has had to wait five years for a review in this *Year Book*. Such a wait is ill-deserved.

Khan has three objectives. First, he employs a historical approach to trace the development of the regulatory regimes and organizations, the practices of States and the relevant organizations, and to highlight the tussles between the international commodity organization and the established principles of international economic law. Secondly, he studies the commodity regimes as organizations with specific functions and looks to recent developments for indications on future progress. And thirdly, he applies an 'international legal approach' to examine the working of the commodity organizations within the context of international law, relying on 'recognized sources of state practice, decisions of international organisations, and constitutional provisions'.

The first two chapters deal with 'Principles of International Economic Law of International Commodity Organisations' and the historical 'Development of International Commodity Policy'. There then follow three chapters examining the framework and operation of the three principal methods of commodity trade regulation: the International Quota System, as used in the Cocoa, Coffee and Sugar Agreements; the International Stock System, of which the best example is that used in the regulation of the tin trade; and the Multilateral Contract System as used solely in the International Wheat Agreements. The development of these three methods is described in some detail, as are the mechanics of their operation and their relative merits. At all times the author writes with clarity and insight. Chapters six and seven examine the New International Economic Order, the Integrated Program for Commodities, and Latters Common Fund, as developed by UNCTAD. The final chapter is on the 'Treaty and Institutional Aspects' of the commodity organizations, and the work is rounded off with a full set of summaries and conclusions.

The book's organization is excellent. It is extremely readable and peppered with anecdotes about events and personalities which would not have seen the light in a more turgid work. The author has clearly devoted a great amount of time to collecting materials from a wide range of sources. These are suitably documented in the extensive footnotes, which will be of very great use to those interested in an area which has traditionally been outside mainstream public international legal scholarship and of negligible interest to practitioners. Of particular use to both will be the extensive presentation and analysis of the practice which has developed in international commodity policy since the signature of the Paris Sugar convention in 1864. In the absence of the judicial and arbitral settlement of disputes this practice is likely to become crucial in the determination of the law, and in this respect Khan provides a great service.

The collapse of the Tin Council has raised legal questions which Khan has not addressed in his section on the institutional and treaty aspects of the organizations, but which ought, perhaps, to have been foreseen and dealt with accordingly. The legal personality of international commodity organizations is discussed. Thus it is stated that '[all] the . . . organisations have legal personality in particular in the countries where the headquarters . . . are situated' (p. 369). But what is their legal status in other member countries, where there is no Headquarters Agreement to confer domestic legal personality? Or in non-member countries? In particular, does the ITC have objective international legal personality, as that concept has been understood by the International Court of Justice in the *Reparation* case (*ICJ Reports*, 1949, p. 174), such as to allow it to entertain claims against non-member states who flooded the international market with tin and

brought about the ITC's collapse? Khan further writes that the organizations 'have corporate entity, and capacity to contract and acquire property, dispose of marketable and immovable property and institute legal proceedings' (p. 320). Within domestic law, and UK law in particular, the meaning of such 'corporate entity' is unclear, and in particular it cannot be emphatically asserted, in the manner that Khan does, that '[t]heir identity and decisions are distinct from that of the members' (p. 364). A good deal of the banks' and brokerage houses' case against the ITC rests precisely on the view that the member States have joint and several responsibilities for its liabilities. Khan himself provides some support for this contention in describing the solution to the problem of the legal personality of the Buffer Stock Committee established by the 1934 Tin Buffer Stock Agreement (pp. 163-6). Does 'corporate entity' give the ITC the status of a public limited company, or of a private company, or of a partnership?

Related to the question of personality is that of immunity from jurisdiction of national courts. A section on the legal nature of these organizations' trading activities and whether they are commercial or sovereign would have been useful. The difficulties of such a section given the absence of case law on the question is apparent, but such a section would have given the work a pioneering quality which it might otherwise be said to lack. Khan cannot be faulted for having failed to foresee the collapse of the ITC. He may wish, however, in the second edition to rewrite at least a prophetic part of p. 390: 'the machinery of international action has been improved in successive Tin Agreements, particularly in relation to the anticipatory action. The Stock Manager can now operate not only in London market but in other recognized markets transact in "spot" as well as future markets. The scope within which he takes such action is wide.' No doubt the sales of this work have increased dramatically since October 1985. They are well deserved.

PHILIPPE J. SANDS

Prior Consultation in International Law—A Study of State Practice. By FREDERIC L. KIRGIS, JR. Charlottesville: University Press of Virginia, 1983. 398 pp. \$35.

Consultations are generally viewed as a form of negotiations. It is not, therefore, surprising that Article 33 of the UN Charter does not expressly mention them as one of the 'peaceful means of settlement'. Another reason for their absence is that they usually take place prior to the emergence of a particular dispute (Merrills, *International Dispute Settlement* (1984), pp. 2-6) and do not have settlement as their primary object (p. 12 n.). Prior consultations are a particular form of this 'preventive medicine', seeking to avoid the dispute potential of unilateral State action. The dosage ranges from prior notification to prior consent, depending upon the severity of the harm to other States anticipated.

Prior Consultation in International Law is the sixteenth volume in the *Procedural Aspects of International Law* series edited previously by Richard Lillich and now by Robert Goldman. Professor Kirgis hopes that his survey of State practice will guide the decision-maker (p. 375), and to this extent perhaps the book itself will contribute to dispute avoidance. However, he stresses that he is not attempting to create 'a new normative structure' (p. 7). Rather, he wishes to analyse 'existing normative expectations' (p. 6) and draw conclusions from State practice (p. 7).

In the first three substantive chapters, Kirgis examines the extent of prior consultation in three areas of shared resources. Some of these, like international watercourse systems and air basins, are generally regional, whereas others such as oceans and outer space are not. As the author himself concedes (p. 6), prior consultations in shared resources are quite well documented. To this extent, these chapters fill the many gaps in research and bring the whole area up to date. The last two substantive chapters cover areas previously less well documented. Here, Professor Kirgis draws on his own particular expertise (Kirgis, *International Organizations in their Legal Setting—Documents, Comments and*

Questions (American Casebook Series, 1977)) to provide the reader with what is often quite original material relating to international organizations and economic relations. The author provides a useful 'synthesis' at the end of each of these chapters which eases comparisons of different areas.

It might be thought that particular problems arise regarding the legal significance to be attributed to State practice in such procedural matters as a prior consultation duty (see, for example, Bourne, 'Procedure in the Development of International Drainage Basins: the Duty to Consult and Negotiate', *Canadian Yearbook of International Law*, 10 (1972), p. 212). Unfortunately, the author's discussion of this matter is regrettably brief (see Chapter 1). He concludes that (p. 359) 'there is no across-the-board requirement in international law that governments must consult others whenever they contemplate taking or permitting any unilateral action that might adversely affect the interests of nonnationals or of the international community as a whole'. Instead, it is necessary to examine each case individually according to State practice. However, he is able to identify factors making such a duty more, or less, likely (see, in particular, 'Practice-influencing Factors', pp. 366-74).

Although expressly a 'Study of State Practice', this valuable work would be of even wider interest had it put the duty of prior consultation into broader perspective. The author mentions briefly the more familiar concept of the duty to negotiate, but fails properly to explain the relationship between that concept and prior consultations. He observes, for example, the ICJ's view expressed in the *North Sea Continental Shelf* cases that the duty to negotiate has its origins in the UN Charter (p. 359). As we have already seen, a duty to consult is unlikely to have this origin as it is concerned with dispute avoidance rather than settlement (p. 267). Further, does a duty to consult, like the duty to negotiate (*Fisheries Jurisdiction* cases), arise out of the respective rights of the parties? And, if not, what is its origin?

Prior Consultation in International Law is a very important contribution to the study of dispute avoidance/settlement and should provide a useful manual for government advisers and an invaluable asset for scholars wishing to pursue this young subject further.

TIM WRIGHT

La Conférence des Nations Unies sur le droit de la mer: Histoire d'une négociation singulière. By J. P. LEVY. Paris: Éditions A. Pedone, 1983. 159 pp. 100 F.

As a staff member of the UN Secretariat, J. P. Levy attended all the sessions of the Third UN Conference on the Law of the Sea (1973-82), including those of the Sea-Bed Committee (1968-73). His account of this 'singular negotiation' has the intrinsic value of the testimony of an insider witness and is most valuable for all those who are interested in understanding the functioning of the Conference, more especially as its business often took place in private meetings, for which no summary records exist.

After a description of some organizational aspects of the Conference, an analysis of its rules of procedure, including the consensus principle (pp. 43-7) and the notion of the 'package deal' (p. 53), there follow a few interesting considerations concerning the so-called 'negotiating texts'. Faced with the absence of a single basis of discussion, the Conference entrusted the Presidents of the main Committees with drafting such documents, which were to take into account all the official and unofficial debates, without prejudice to the position of any delegation (pp. 57-61). A series of 'negotiating texts' has been issued since 1975, at the end of the Third Session of the Conference; these gradually took the form of a 'Draft Convention on the Law of the Sea' submitted to the final vote of the Conference in 1982.

Special attention is devoted to the unofficial groups which met to face problems impossible to resolve in plenary meetings. In this respect, the personalities who initiated and

presided over such groups were of first importance. Thus, at times when the Conference seemed to come to a deadlock, personalities like Jens Evensen (pp. 69-72) accomplished the difficult task of reconciling divergent positions. J. P. Levy also describes other original working methods, such as unofficial meetings of different working groups (pp. 81-4) and intersession meetings of the Drafting Committee (pp. 86-95). Furthermore, the author offers an impartial and faithful description of the influence and consequences of the US Deep Sea Hard Mineral Resources Act of 1980 on the negotiations within the Conference (pp. 95-100), as well as the dramatic shift of the American position owing to the change of Administration.

The book ends with a very detailed picture of the last moments of this long adventure and relates in a style full of suspense the final roll-call vote requested by the American delegation (pp. 133-6).

The methods used by the Third UN Conference on the Law of the Sea were perhaps the only ones which could lead to a general consensus. Yet the disappointing way in which this negotiation finished shows very well the limitations of such methods. Moreover, the lack of *travaux préparatoires* renders the eventual task of the interpreter very difficult. The main contribution of J. P. Levy consists, apart from describing the work of the Conference, in highlighting some aspects of it, of which no trace is left.

HARITINI DIPLA

The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory. Edited by R. ST J. MACDONALD and DOUGLAS M. JOHNSTON. The Hague: Martinus Nijhoff, 1983. vii + 1234 pp. f82.50.

This book should be welcomed by international law practitioners and theorists alike. In form, it is a collection of thirty-eight legal essays prepared by distinguished international lawyers and scholars. In substance this excellent volume is a well-annotated, advanced textbook on international law.

The genesis of the book is explained by the editors in an introductory essay on the state of international law today. The essay suggests that international law is suffering an erosion of its theoretical and doctrinal foundations. Evidence for that erosion, the editors feel, is demonstrated by the dearth of contemporary theoretical works in international law. The erosion is ascribed by the editors to at least three developments that have affected the international law profession in the late twentieth century. First, international law practitioners currently spend most of their efforts 'reacting' to the myriad problems of a complex and fast-paced transnational society and consequently have little opportunity for the reflection necessary to bring theoretical insights to bear on those problems. Secondly, the sheer immensity of the international law field today has resulted in a public and private international law profession that is increasingly fragmented into highly specialized subject areas of practice with little cross-communication from one area of practice to another. Thirdly, members of the academic community, the traditional source of theoretical literature, increasingly have become drawn into practice as consultants and advisors. As a result, academic practitioners have had less time to devote to the theory and science of international law than they have had in the past. The editors hold the view that, as matters stand today, the 'science of international law seems seriously deficient in major theoretical works'. This book represents a successful effort to begin to correct the perceived deficiency in the theoretical literature of international law.

The book is divided into four parts. Part I reviews the primary schools of jurisprudential thought (the natural law school, the positive law school, the Marxist-Leninist school and the policy-oriented school) and examines the impact that those schools of thought have had on the work of international lawyers. Part II views international law from

the perspective of the various social sciences (political science, international relations, economics, sociology, psychology and anthropology). Part III analyses the fundamental concepts underlying international law (statehood, recognition, sovereignty, equality of States, custom, jurisdiction and State responsibility). The analysis contained in Part III amounts to a reappraisal of the conceptual apparatus of the international legal system which relates to all subject areas of international law. Part IV provides additional theoretical speculations about international law in the context of specific current legal problems (the relationship between municipal law and international law, human rights, minimum legal standards, international protection of the environment, peaceful settlement of disputes, and the role and function of the UN and other international organizations).

The heart of the book rests in Part III, which addresses the theories underlying the foundational concepts of international law that are shared in common by many specialized areas of international law practice. It is Part III which initially should attract the attention and the interest of public and private international law practitioners who seek to deepen their theoretical understanding of fundamental international law concepts related to their respective specialized areas of practice.

The opening essay in Part III of the book examines the position of individuals either as subjects or as objects of international law. That examination includes a review of the status under customary and conventional international law of other entities including States, protectorates, trust territories, the Vatican, the UN, corporations and such non-governmental organizations as the International Red Cross. The essay suggests that, from a theoretical viewpoint, it is not particularly useful to view individuals as mere objects of international law incapable of seeking legal redress for wrongs in the absence of State sponsorship of their claims. The essay traces the strengthening of the procedural and substantive legal capacity of the individual from the establishment of the Central American Court of Justice in 1907 to the post-Second World War progress in the area of human rights, especially the ability of an individual to bring independent claims against States before the European Commission of Human Rights and the Human Rights Committee of the UN. One should bear in mind that, in the final analysis, the enhanced position of individuals under international law today has been conferred upon those individuals by States and in that sense, at least, individuals remain in practical effect objects of international law dependent on States for redress of legal wrongs.

The essay on custom presents a spirited defence of the need for *opinio juris* in the formation of customary international law. However, the essay does not seem to emphasize sufficiently the complementary need for a certain 'amount' of State practice or usage to give a customary international rule substance. In this regard, it is noteworthy that there is no mention of Thirlway's important work on this question.¹

The essay on jurisdiction (the capacity of a State under international law to make or enforce a rule of law) presents a concise but in-depth review of the theoretical principles of jurisdiction and the difficult practical questions involved in the resolution of problems of concurrent jurisdiction especially in the area of anti-trust laws. In the treatment of the nationality principle of jurisdiction, under which a State may prescribe rules of law governing the conduct of its own nationals abroad, the essay examines the sharp divergence of views on the question of whether or not the jurisdiction of the State of nationality should extend to foreign, parent or subsidiary corporations without regard to the fact that those corporations technically have separate legal personalities. For example, the UK, the essay points out, has taken the position in resolving such jurisdictional problems that the separate legal personalities of a parent and subsidiary should be respected. In contrast, US courts in interpreting US anti-trust laws tend to brush aside the fact of separate incorporation in favour of an inquiry into the substantive business connections between a parent and subsidiary corporation.² Although one may disagree with the

¹ H. Thirlway, *International Customary Law and Codification* (Sijthoff, 1972).

² The US Supreme Court, in a recent case involving domestic corporations, underscored its apparent rejection of separate incorporation as a relevant inquiry in applying provisions of the US

conclusion that, in the first instance, the 'onus lies on the United States' to resolve jurisdictional conflicts over the application of the US anti-trust laws, the essay correctly suggests that the ultimate solution of such jurisdictional conflicts may require a balancing of the more basic international law principles of equality of States, non-intervention and territorial integrity.

The other essays in Part III explore such topics as the resiliency of State sovereignty as an international law principle, the problems of equality of States viewed from legal, economic and political perspectives, the movement away from custom to treaties as the pre-eminent source of international law, a theoretical examination of State responsibility, the need for a re-examination of the theories of recognition and a fascinating exploration of origins and efficacy of the principle of the common heritage of mankind. The remainder of the book (Parts I, II and IV) places the fundamental concepts addressed in Part III in theoretical and practical perspective.

There are a few minor technical flaws in this book which should be mentioned. The book does not contain a subject index or a table of cases. Such indices would substantially assist readers who want either to delve into a discrete subject area or who want to discover quickly whether the book addresses a particular case. In addition, there is no uniform list of abbreviations and there is no uniform system of citation among the essays, which at times distracts the reader and creates unnecessary confusion. Finally, there are a few too many typographical errors and omissions for a book of such high qualitative content. These technical observations are offered solely in the hope that the editors might consider correcting them in a later edition.

JAMES E. HICKEY, JR.

International Dispute Settlement. By J. G. MERRILLS. London: Sweet and Maxwell, 1984. xvi + 211 pp. £6.95.

Professor Merrills's second book in the series *Modern Legal Studies* is devoted to the techniques and institutions available to States for the peaceful settlement of disputes. This is a topic of great current importance from both a theoretical and a practical point of view. The book contains ten chapters (1. Negotiation, 2. Mediation, 3. Inquiry, 4. Conciliation, 5. Arbitration, 6. The World Court, 7. The Law of the Sea Convention, 8. The United Nations, 9. Regional Organisations, 10. Conclusions). Although the book is basically concerned with disputes between States, the author does refer to the settlement of disputes between States and entities other than a State (e.g. proceedings before the Iran-US Claims Tribunal), and this gives an even broader picture of contemporary dispute settlement process. As a point of departure, the author takes Article 33 (1) of the UN Charter. The means for the settlement of disputes referred to 'are not set out in any order of priority, but the first mentioned, negotiation . . . in practice is employed more frequently than all the other methods put together' (pp. 1-2).

It is a remarkable advantage of the study under review that the author so successfully interweaves legal aspects of the topic with observations of a non-legal character, which none the less have an important impact on the actual handling of an international dispute. He argues, for example, that summit diplomacy may facilitate agreement by enabling

anti-trust laws. In *Copperweld Corporation v. Independence Tube Corporation*, 104 S Ct. 2731, 81 L Ed. 2d 628 (1984), domestic, parent and subsidiary companies, although separately incorporated, were held not to be conspirators for purposes of US anti-trust laws where the co-ordinated activity of the parent and its wholly owned subsidiary were substantively the activity of a single entity 'not unlike a multiple team of horses drawing a vehicle under the control of a single driver': 104 S Ct. at 2742. Although the Supreme Court in *Copperweld* did not have before it questions of jurisdiction or of the extraterritorial reach of the anti-trust laws, the decision emphasizes that US courts, in the absence of compelling reasons to do otherwise, will continue to reject separate incorporation as a particularly relevant inquiry and will look instead to the substantive economic and business links among corporations in applying US anti-trust laws.

official bureaucracies to be bypassed to some extent, while providing an incentive to agree in the form of enhanced prestige for the leaders. Again, he recommends that in certain situations the less-favoured party be given control of details such as the time and place of negotiations. The author also comments on what he considers to be responsible behaviour by governments concerned in dispute settlement. In other contexts he refers to a 'face saving compromise', 'humiliation' or 'loss of face'.

The author deals with the characteristics of different means of dispute settlement. He states, quite correctly, that it may be difficult to draw the line between mediation and conciliation or to say precisely when good offices ends and mediation begins. As to inquiry, the reader is given a full picture of its evolution from its birth in the first Hague Conference of 1899, its transformation into a form of conciliation, and how eventually, as in the *Red Crusader* case, it became practically a judicial means of disputes settlement. Professor Merrills convincingly concludes that 'the utilisation of inquiry for disputes . . . is a reminder that where sovereign States are concerned, form is subordinated to function' (p. 48). Has the same tendency not become apparent to some extent in the case of the International Court of Justice, in relation to which the author points out the assimilation of the Court's advisory and contentious jurisdictions? A conciliation commission is not an attractive option in major disputes, in the author's opinion. Here again a non-legal factor plays a dominant role, for, as the author stresses, a conciliation commission usually has no political authority to back up its proposals. As regards arbitration, the analysis of the basis of decisions of arbitral tribunals is particularly interesting. A number of examples are presented and they show a diversity of applicable rules belonging to international law as well as municipal law. The author also refers to the fact that the parties to a dispute may ask the tribunal to render its decision *ex aequo et bono*.

An interesting point is made in relation to the *Tunisia-Libya Continental Shelf* case. Professor Merrills finds it evident that there 'the Court was required to reconcile its role as a traditional court of law with a function devised for it by the parties—that of a forward-looking quasi-legislative instrument of dispute settlement' (p. 107). The book was written before the International Court of Justice issued its decision in the later case of the *Libya-Malta Continental Shelf*, but this seems to confirm the author's observation. One may ask whether the Court in reality did not give a decision *ex aequo et bono*. The author concludes that the Court has to reconcile continuity with innovation. The *Libya-Malta* case may also be invoked as an example of the slightly changed character of the Court's decisions, for it may be regarded more as an advisory opinion than a decision.

Professor Merrills gives a thorough account of the methods of dispute settlement provided by the 1982 Law of the Sea Convention. This is of great importance for the whole work because, in a way, it reflects the evolution of the means which have been previously analysed. There can be no doubt that the Convention's provisions on dispute settlement constitute—as the author observes—a remarkable achievement, the influence of which on both the theoretical and practical aspects of future arrangements is likely to be profound. There is no doubt also that the achievement will be greater once the Convention comes into force.

The author is not able to enthuse on the UN role in the field of dispute settlement. The provisions of Chapter VII of the Charter are regarded, not surprisingly, as a dead letter. As a result, a situation has arisen in which steps towards the settlement of disputes must be taken outside the UN. Nevertheless, Professor Merrills claims that 'regional organisations cannot remove the Security Council's ultimate responsibility for the maintenance of international peace and security' and that 'the right to have the matter put before the [Security] Council is something which regional organisations, however insistent, can never take away' (p. 181). On the other hand, he admits that 'insisting that all disputes be dealt with by the Security Council would tend to undermine the effectiveness and prestige of regional organisations' (p. 182).

This is a very attractive and important book which this reviewer read with enjoyment.

Z. WLOSOWICZ

Österreichisches Handbuch des Völkerrechts. Edited by HANSPETER NEUHOLD, WALDEMAR HUMMER and CHRISTOPH SCHREUER. Vienna: Manz Verlag, 1983. Volume 1, xxxv + 465 pp. Volume 2, xii + 486 pp.

This two-volume work is in some ways comparable to the Anglo-American casebooks and has not much in common with a German *Lehrbuch* or a French *Manuel*. This is certainly the case if we understand the Anglo-Saxon case-books not only as a case collection, but as a more or less comprehensive collection of information and materials in the field of international law and international relations. Nevertheless, there are two important differences between this *Handbuch des Völkerrechts* and Anglo-American case-books. First, information and materials are separated in two different volumes (Tome I: 'Information', 465 pp.; Tome II: 'Materials', 486 pp.). Secondly, the short articles are written by a large number of distinguished Austrian international lawyers.

Neither of these differences is very helpful if the book is meant for the use of students. It seems preferable for students to read articles and find help in understanding them through chosen examples included in the materials. By separating articles and the source materials, without connecting them in some way, the materials do not adequately clarify the text and the same materials can be found elsewhere. For example, German-speaking international law students have at hand *Völkerrechtliche Verträge* (3rd edn., 492 pp.), edited by Randelzhofer/Berber, where they find the essential materials needed for their studies at a more modest price than the *Handbuch*.

The first difference, the fact that the articles in Volume I are not written by one or two authors, as in Anglo-American case-books, is not necessarily a handicap because quite a number of the contributors to the *Handbuch* are eminent specialists. Unfortunately, this book is in its conception obviously not intended to be a medium for profound and lengthy discussion which would take advantage of the authors' expertise—because they were asked to keep their contributions short. The result is sometimes like a dictionary entry. For example, under the title 'Sources of International Law' the subject is presented in four and a half pages (pp. 100–5). The volume containing the materials consists partly of judgments without explaining the facts of the cases (p. 16). If the reader wants to analyse for himself the justification for the arguments, he has to undertake a search in the original source, which is regrettable because a collection of materials should limit additional source researching to the absolutely indispensable.

Because this book is written mainly for Austrian users, many of the materials are related to Austrian problems in international law. This may be informative to users from other countries. One can find nearly a hundred documents relating to Austria's position in international law and international relations. They range from political to historical events. One finds, for example, the farewell speech by the last Austrian Chancellor before the Germans took power in 1938 (p. 46) and the law establishing Austrian Neutrality on 26 October 1955. Whereas this part of the materials is quite useful, other parts, like the Charter of the UN, which extends over forty-two pages, should in any event be in the hands of interested readers and need no reproduction.

HANS-JOACHIM MENGEL

The Security Council and the Arab-Israeli Conflict. By ISTVAN S. POGANY. Aldershot: Gower, 1984. 225 pp. £15.

The subject of this book could not have been more timely. The year 1985 marked the fortieth anniversary of the establishment of the UN, the organization whose primary purpose is to 'maintain international peace and security'. For almost all those forty years, the Security Council has been grappling with the tragic and intractable Arab-Israeli conflict. Yet the years of debates and the countless resolutions do not appear to have brought the problem any closer to a permanent solution. On the contrary, the situation

in the Middle East is now considered to be the most serious threat to international peace and security in a very dangerous world. Successive rounds of terrorist acts and use of force continue, in apparent disregard of the political ideals and the principles of law embodied and accepted in the UN Charter. At the same time, however, the parties continue to attempt to justify their actions with arguments based upon those same principles of international law.

In fact, the legal issues are inseparable from the military and political ones, and have proved to be just as highly contentious. Considering the attacks, the counter-attacks and the justifications offered for them, one may question, for example, the meaning and application of the right to self-determination; what the legal limits are on the use of force in the post-Charter era; the scope of the right to self-defence; the legality of reprisals or retaliation, and their relationship to self-defence; whether anticipatory self-defence is permissible and in what circumstances; the extent of the right to collective self-defence; whether the right to self-defence includes the protection of nationals abroad; whether the invasion or bombing of a State is justifiable as self-defence, if the State is allegedly harbouring terrorists; the applicability of the laws of war to the conflict in the Middle East; and so forth.

One might also ask how the Security Council, which under the UN Charter has primary responsibility for the maintenance of international peace and security, has responded to the legal aspects of the political issues involved throughout the Middle East conflict since its inception. One might further enquire how, or whether, the legalities of the situation have influenced the actions of the Security Council and, ultimately, whether the Security Council has contributed anything to a potential solution of the political problem.

Most of these issues are addressed in some manner in the rather slim volume under review. The author announces his purpose as being to analyse in a comprehensive study the contribution of the Security Council to the maintenance of peace in the Middle East during the five wars between 1945 and 1982. He explains that, because an 'understanding of the limitations and potentialities of the Security Council is of equal interest to the international lawyer and to the political scientist, both of whom are concerned with problems of world order', he has attempted to engage in an 'interdisciplinary enquiry, employing the techniques and perspectives of both disciplines'.

The book comprises eight brief chapters. The first sets out in a rather basic manner the provisions in the UN Charter dealing with the maintenance of international peace and security. The second draws a rapid sketch of the history of the Palestine question from the Balfour Declaration of 1917 to the British decision in 1947 to surrender its mandate to the UN. The next five chapters examine, in succession, the initial Arab-Israeli conflict of 1948; the Suez Crisis of 1956; the Six Day War of 1967; the Yom Kippur War of 1973; and the 1982 invasion of Lebanon by Israel. The final chapter attempts to draw some conclusions about the role of the Security Council in 'managing' the continuing conflict.

Unfortunately, the author has set himself too great a task to be accomplished in so small a space, and by someone with no practical experience in diplomacy and international politics. The Middle East conflict and the larger political setting in which it has been played out since before the beginning of this century is much more complex and has far broader implications than he appears to appreciate. Similarly, there is considerably more to the operation of the Security Council and the interplay of the myriad political forces that underlie its every utterance and manoeuvre than is evident in his brief exposition. Furthermore, there is no examination of the sophisticated interrelationship between legal determinations and the political decisions that arise from them, or give rise to them.

Hence, the author's preface does not quite accurately describe what he has actually written. There is rather more fact and law, and rather less political analysis than one might expect. In each of the five chapters dealing with a Middle East war, the author, in a painstaking methodical fashion: (1) narrates the main events of the armed conflict; (2) goes through a thorough textbook analysis of whether the actions on either side were

contrary to, or in accordance with, international law (mainly contrary); and then (3) describes in elaborate detail, almost minute by minute, how the Security Council reacted to each situation. The assessment or evaluation of the work of the Security Council figures only in the final few pages of the book.

It is to be regretted that, however commendable the author's detailed recitation of the facts may be (his footnotes indicate extensive research), and whatever one may think of his legal judgment (it is possible to agree with him most of the time), he does not take his analysis far enough politically to shed any new light on these difficult and complex issues. It is also surprising that the author does not discuss the inevitable limitations of a strictly legal approach in understanding or resolving a problem that is so highly charged emotionally, and whose religious and nationalistic aspects are so deeply rooted in history. Moreover, the continuing hostilities and the lack of even a glimmer of hope for a comprehensive peace settlement emerging from the Security Council or any other UN organ casts some doubt on the author's conclusion that the Security Council 'has made a significant contribution to the preservation of world order, which can be considered under three separate headings: (a) crisis-management; (b) the establishment of peace-keeping and observer groups; and (c) the elaboration of principles to govern the resolution of international conflicts'.

LOUISE DE LA FAYETTE

The New Law of Maritime Zones with special reference to India's Maritime Zones. By P. CHANDRASEKHARA RAO. New Delhi: Milind Publications Private Limited, 1983. 423 pp.

In 1976 India enacted the Maritime Zones Act. This work seeks to explain this piece of legislation from the standpoint of both the new law of the sea and the constitutional scheme with special reference to 'Centre-State competence and rights' in respect of India's maritime zones.

Dr Rao discusses the law governing each maritime zone embodied in the Act, namely the territorial waters, the historic waters, the continental shelf, the exclusive economic zone and the contiguous zone. He next examines the maritime legislation of India relevant to each zone. Then he considers the relationship between the federal authorities and State authorities with respect to the allocation of competences and rights in the particular maritime zone. Thus the work not only offers a solid treatment of the new legal regime of the oceans but also provides a penetrating analysis of the legal relationship between the coastal units and the federal authorities of India with respect to maritime matters.

In his attempt to defend the maritime legislation of India, Dr Rao raises several controversial issues of the law of the sea, for instance, the right of innocent passage of warships in the territorial sea, the inclusion of the notion of 'security' as a basis for coastal State jurisdiction in the contiguous zone, and the coastal State's sovereignty over the continental shelf. It may be remarked that all these issues concern, to some extent, the military or quasi-military uses of the sea and some of them were, at times not surprisingly, intensely debated during the negotiations of the Third UN Conference on the Law of the Sea.

On the question of the innocent passage of warships in the territorial sea the author concludes that 'the widely shared view appears to be that, having regard to conflicting State practice, customary law has not recognized any right of innocent passage of foreign warships' (p. 3). Incidentally, India's legislation requires that foreign warships, including submarines and other underwater vehicles, give prior notice before entering or passing through India's territorial sea.

Dr. Rao's conclusion may well be correct. However, in this reviewer's opinion, the author disregards or minimizes the significance of certain developments on this controversial matter within the Conference. First, attempts to impose restrictions on the right

of innocent passage of foreign warships failed to obtain the required consensus. As a consequence, the 1982 Convention contains no provision which on the face of it empowers a coastal State to require either prior authorization or notification for the passage of foreign warships in its territorial sea. In this respect the 1982 Convention follows the Geneva Convention. Secondly, Article 19 of the Convention (meaning of innocent passage), which prohibits several activities of a military or quasi-military nature, applies especially to warships and in fact was designed to safeguard the security interests of coastal States. This approach is in line with President Koh's statement at the eleventh session of the Conference when he referred, *inter alia*, to the rights of coastal States to adopt measures to safeguard their security interests, in accordance with Articles 19 and 25 of the Convention. (*Third United Nations Conference on the Law of the Sea, Official Records*, vol. 16, 176th meeting). These developments cannot be lightly dismissed.

It will be recalled that the International Law Commission did not recognize special security rights in the contiguous zone. It was of the opinion that the extreme vagueness of the term 'security' would open the way for abuses. The matter, in its opinion, was already sufficiently covered by the general principles of international law and the Charter of the UN. Dr Rao dismisses the Commission's statement on this matter as being 'evasive' and considers that it fails to take account of the security zones that are in force. Of course, both Article 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and Article 33 of the 1982 Convention on the Law of the Sea do not include the notion of 'security' as a basis for coastal States' jurisdiction in the contiguous zone. In this reviewer's opinion, this matter continues to be governed by the rules and principles of general international law (see paragraph 8 of the Preamble of the 1982 Convention on the Law of the Sea).

Dr Rao argues quite forcefully that a coastal State possesses sovereignty over its continental shelf. Thus, in his opinion, the nature of a State's rights over its continental shelf is not simply a functional, specialized competence over the resources of the shelf but amounts to 'full sovereignty'. The author relies, among other things, on State practice before the 1958 Geneva Convention on the Continental Shelf. He argues that 'the Geneva Convention codified, as held by the International Court of Justice, the existing customary law on the continental shelf'. In his view 'the words "... sovereign rights for the purpose of exploring it and exploiting its natural resources ..." occurring in Article 2 of the Geneva Convention were not intended to suggest any limitation on the plenary authority of the coastal State over the continental shelf, but merely to indicate that the continental shelf rights would not affect the legal status of the superjacent waters' (p. 128). This is an interpretation of the commentary by the International Law Commission on the relevant draft articles which may not be necessarily valid.

In its fairly recent judgment concerning jurisdiction over the sea-bed and subsoil of the continental shelf off Newfoundland (1984) (*International Legal Materials*, 23 (1984), p. 294) the Canadian Supreme Court took a rather different view. It declared that the 1958 Geneva Convention 'does not grant "sovereignty" over the continental shelf but rather "sovereign rights to explore and exploit"'. These limited rights co-exist with the rights of other nations to make use of the sea-bed for submarine cables and pipelines (Article 4) and do not affect the status of the superjacent waters or airspace (Article 3). They stand in marked contrast to the full sovereignty (saving only other nations' right of innocent passage) which international law accords to coastal States over their territorial sea.' In this reviewer's opinion, there is no reason to interpret Article 77, paragraph 1, of the 1982 Convention differently.

This reviewer was particularly impressed with the author's treatment of the exclusive economic zone. He carefully traces the developments of the concept through the Sea-Bed Committee and the Third UN Conference on the Law of the Sea and provides a useful analysis of the legal nature of the zone.

One of the issues raised by the author in considering the historical background of the concept of the exclusive economic zone concerns the so-called 'territorialist' position.

The author describes the position of the 'territorialist' States as 'seeking to eliminate the spectre of hostile movement of submarines, military ships and defense aircraft in the vicinity of their territories' (p. 218). He notes that this position did not find a place in the draft but warns that it cannot, however, be said that the proposed convention would be the last word on the issues raised by the 'territorialist' State.

However, almost in contradiction to this statement the author acknowledges an important truth about the new concept as embodied in the 1982 Convention in that the rights and jurisdiction of the coastal States and the rights and duties of other States in the zone are specified 'and it is not permissible to either side to enlarge them by assimilating the exclusive economic zone to the territorial sea or to the high seas' (p. 253).

On the question of 'Centre-State competence and rights', Dr Rao's thesis amply demonstrates the proposition that the federation has paramount rights in maritime areas—a proposition which is indeed the juridical approach in several federal countries. The author gives a particularly full treatment of the question whether the territorial waters of India form part of the territories of the respective federal units. Both the High Courts of Madras and of Madhya Pradesh held that what was vested in the Union was the bed of the sea beneath the territorial waters and not the waters themselves and in law the two did not stand in the same position. After a detailed and comprehensive examination of the relevant constitutional provision, Dr Rao concludes that, under the Constitution of India, the territorial waters of India form an integral part of the territory of India, and that it is the Union, not its constituent units, which has the exclusive proprietary rights in, and the legislative competence over, such waters.

This monograph, though based on the Draft Convention on the Law of the Sea, is a valuable contribution to the literature on the modern law of the sea. The fact that the new norms of the law of the sea are also discussed in the interface, as it were, between constitutional law and international law can only enhance its value.

L. D. M. NELSON

Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity. By NATALINO RONZITTI. Dordrecht: Martinus Nijhoff, 1985. xix + 216 pp. f125; \$42; £34.75.

This is a topic of increasing importance. Having outlined the various theories which either do, or do not, justify such rescue operations, the author examines in some detail State practice since 1945, identifying those States which regard such operations as lawful, and those which do not. The ICJ judgment of 24 May 1980—that is the *obiter dictum* on the abortive rescue mission—is rightly regarded as inconclusive.

Yet the author assumes that such operations cannot be regarded as self-defence, and therefore looks to see, in this practice, whether the concept of self-defence has been broadened since 1945, so as to include it, or alternatively, whether such operations are now regarded as a quite new head of justifiable recourse to force. It is a curious argument, for it runs counter to the views of many States (and authors) that rescue operations were regarded as legitimate self-defence prior to 1945. Thus, the author begins with an unargued, unproven premiss. From this premiss it is all too easy to conclude that 'post-Charter precedents do not as yet authorise the creation of a rule of customary international law permitting unilateral action in foreign territory for the protection of nationals' (p. 64). Obviously, the practice lacks the general acceptance necessary to establish a *new*, customary rule. But this begs the question, for many regard this practice as confirming the continued existence of an *old*, customary rule.

Nevertheless, the author does examine what the main features of a new rule—*de lege ferenda*—allowing protection might be (pp. 68–76). This new rule would be permissible, apparently, because the *jus cogens* rule prohibiting the use of force does not encompass rescue operations (p. 76). Why this is so is not very clear. The answer that this is

so because rescue operations are legitimate self-defence is, of course, excluded by the author's premiss.

In Chapter III the author rightly isolates the case in which the operation is carried out with the consent of the territorial State. The legitimacy of such operations is accepted, subject to the consent satisfying certain conditions such as that it should emanate from the effective government, that it should be freely given, and not contrary to any rule of *jus cogens*.

Equally correctly, in Chapter IV, the author distinguishes humanitarian intervention and carefully analyses the State practice used by some authors to support a right of humanitarian intervention—Palestine (1948), Bangladesh (1971), Kampuchea (1978) and Uganda (1979). The conclusion that none of these examples shows a reliance on this so-called right of intervention is clearly correct.

Chapter V examines the case of a treaty right to intervene, the recent example being the 1960 Treaty of Guarantee of the Cyprus Republic. Setting aside the specific problems of interpreting Article 4 of that treaty, it is not easy to see the basis for a distinction between a consent given by treaty and an *ad hoc* consent. But the author does pose the question whether such a treaty provision is contrary to *jus cogens*: and reaches the conclusion that a treaty right to support self-determination would not be contrary to *jus cogens*.

The final chapter is devoted to the use of force at sea, to suppress piracy or other acts of violence against vessels, and, whilst its conclusions seem sound enough, they are not directly related to the central theme of the book.

In summary, this is a useful book, containing a good deal of new material. If this reviewer cannot share all its conclusions this is hardly surprising on so controversial a topic.

D. W. BOWETT

Judicial Independence: The Contemporary Debate. Edited by S. SHETREET and J. DESCHÊNES.. Dordrecht, Boston, Lancaster: Martinus Nijhoff, 1985. xix + 700 pp. (including appendix and index). £67.95; f245; \$83.50.

The first section of this book comprises twenty-nine essays examining the laws concerning judicial independence in twenty-six States. These were produced in response to an IBA questionnaire (the appendix) and, generally, benefit from a common structure. The second section considers the transnational aspects, reproducing various non-governmental texts defining minimum international standards with accompanying commentaries. The final section contains general analyses of judicial independence.

This work is useful in emphasizing that judicial independence encompasses not only a freedom from direct interference, but also from more subtle control methods such as underfinancing, adverse variation of conditions of service and biased assigning of cases, which may be more effective than barefaced meddling.

There is little discussion of the international judge, and the arbitrator is ignored; therefore, for the international lawyer, the interest of this work is as a background to current ECOSOC attempts to develop international minimum standards of the independence of international and municipal judges—which the authors of the non-governmental texts hope their efforts will inform.

The transnational codes were elaborated on the basis of municipal practice and provide a salutary illustration of the problems involved in this process. It is noted (at p. 404) that the principle of an independent judiciary is generally accepted, but that the IBA study emphasized that different approaches create different substantive rules—practices rejected in some systems as inconsistent with judicial independence were accepted as unexceptional in others: an example being the denial of the doctrine of precedent in some systems on the ground that this infringes the judge's independence from his brethren

(see pp. 81, 128, 431, 637—8). But practices which objectively were inconsistent had to be accommodated in the transnational standards because of their long history in given systems without apparent harm to judicial independence.

There are profound problems in inducing international norms from municipal analogies of judicial independence: it is too tightly tied to constitutional structures to allow of broad generalization. It is difficult to see how the close details, at which the authors of the international standards aim, can be culled from diverse municipal variants. Some contributors note that it is impossible to discuss judicial independence in socialist States because they lack a liberal-democratic separation of powers, but the implications of this for the elaboration of international laws are not addressed.

The quality of the individual essays varies: some are excellent and thought-provoking (Kirby, Andrew, Stephen, Shetreet), others frankly disappointing. But the good outweigh the bad to produce an interesting examination of an important issue.

IAIN SCOBIE

Rethinking the Sources of International Law. By G. J. H. VAN HOOFF. Deventer, Antwerp, Boston, Frankfurt, London: Kluwer Law and Taxation Publishers, 1983. xiv + 322 pp. \$46.

Discussion of the sources of international law is not closed. On the contrary, new areas are opening up for consideration. This is basically due to rapid changes taking place in the international community, changes which create discrepancies between law and reality. There can be no doubt that the term 'international law' nowadays covers more than it did when what is now Article 38 of the Statute of the International Court of Justice was formulated in 1920 or reformulated in 1945. The question, however, is how far the limits of international law have moved. In this work G. J. H. van Hoof 'rethinks' the sources of international law. This is an ambitious task and the result is very creditable.

The book is divided into three parts (I—'The Approach to the Problem of the Sources of International Law', II—'The Traditional Sources of International Law', III—'Tentative Reformulation of the Doctrine of Sources'). This constitutes a logical and attractive structure. As his point of departure the author takes a definition of international law that limits its operation to the relations between States. This is an acceptable approach for 'inter-state relations can still be said to constitute [international law's] primary aim' (p. 20). Nevertheless this approach has certain consequences. In particular, the work does not consider the application of international law to the wider range of transnational situations, including relations with individuals, which are assuming a growing importance.

The author examines three approaches to international law which he calls legal idealism, the analytical approach and the sociological approach, and takes a 'middle-of-the-road position' between the extreme formalism of traditional positivism and the 'almost complete amorphism of the sociological approach' (p. 283). Of the familiar categories set out in Article 38 of the Statute of the International Court of Justice the author gives priority to customary law on the ground that it is the oldest source. This statement may appear to be questionable. While there is no doubt that there are three fully-fledged sources described in Article 38 Statute of the Court, there remain questions as to priority. One should not assume that the order in which they appear in Article 38 is entirely accidental. Is there some hierarchy among these categories? Treaties, as rightly mentioned by the author, constitute the newest source of the three. But is custom really the oldest one? If we look at Article 38 from the point of view of its application we will obtain a practical hierarchy: treaty, custom, general principles. On the other hand, when Article 38 is examined from the point of view of the genesis of the sources, the hierarchical order seems to be the reverse.

The book contains many perceptive comments on customary law. Of particular interest is the author's treatment of the 'individualized' character of international law as a result of those customs which, like treaties, may be binding on a limited number of States. The problem of the practical importance of the change of customary international law is given suitable attention. Here the author claims that if 'there exists a customary rule, every deviating behaviour or practice first and foremost constitutes a violation of international law' (p. 100). He finds it impossible to accept the extreme thesis that every violation contains 'the seeds of a new rule'. The change of a customary rule—according to van Hoof—'requires the crumbling away and disappearance of *opinio juris* with respect to the old rule and, subsequently, the development and the expression of *opinio juris* with respect to the new one' (p. 101). It is admitted, however, that in reality the two processes sometimes coincide. The last remark is important for it would not be practical to assume, as does the author, that only when the old norm has been abolished by the withdrawal of *opinio juris* does the process of creating a new one start again.

The author is not particularly enthusiastic about the prospects of customary international law. He observes a decline of custom as a source of international law, due to its slowness and the increased heterogeneity of the international society. Customary law—as the conclusion goes—'is best fitted for comparatively homogeneous communities where the interests of the members do not dramatically diverge'. But 'as soon as the community grows and its members start developing different interests and conflicting views it becomes less reliable' (pp. 114–15). Whether customary international law is really too slow to provide the necessary regulation for the new areas which international law now has to cover would require a much closer analysis of already existing customs.

The author does not devote much of his attention to treaties. Their advantages over customary international law are pointed out and their unambiguous and uncontroversial character as sources of international law is emphasized.

The discussion of the general principles of law recognized by civilized nations constitutes one of the most interesting parts of the book. A thorough historical background of this controversial source is presented. In the author's view two distinctions with respect to the nature and functioning of the general principles are vital to their correct understanding: 'The first one concerns the distinction between, on the one hand, the use or application or invocation of general principles by the I.C.J., and, on the other hand, the role of these principles outside the framework of the Court, that is within the inter-state relations in general' (p. 134). The second distinction is made between procedural and material provisions of international law. In the procedural sense, general principles point out a method of creating rules of international law; the material sense refers 'to the intrinsic value of the substantive content of a given rule' (p. 134). In finding out in what way the consent or acceptance of States is manifested through the general principles of law, the author identifies two methods: first manifestation on the basis of reception from municipal legal systems and, secondly, manifestation through induction from existing rules of international law. This discussion leads the author towards *jus cogens*. The question of a change of norms of international law appears again this time in relation to *jus cogens*. Here, once again, the author claims that 'the first step in the process of changing international *jus cogens* is withdrawal of the collective *opinio juris cogentis* with respect to the old norm'. Until this has occurred—according to van Hoof—contrary practice must be considered to be a violation (p. 167).

The rest of the book holds even greater interest, for it raises the problem of those international instruments which do not fall within the scope of Article 38, yet which possess certain features analogous to those of true sources of international law. These are the so-called 'grey area' of 'soft law'. The author is aware that the doctrine of sources of international law should be reformulated. He, none the less, is against a 'widening of the concept of traditional sources, which means that he would reformulate the doctrine without a reformulation of the actual terms of Article 38. Such a reformulation, however, would have a direct impact on actual sources and this seems to be the author's goal.

In order to achieve a further systematization of the doctrine of sources of international law the author outlines five types of manifestation of consent or acceptance by States. These are: (1) the general class of abstract statements; (2) the so-called *travaux préparatoires lato sensu*; (3) the text of a rule or document; (4) the follow-up to the rule or the document; and (5) subsequent practice relevant to the rule or document concerned (p. 205). These classes are not intended as a substitute for but as a supplement to the traditional sources of international law, and they are to be applied only in cases where the question as to existence of a rule of international law cannot be sufficiently answered on the basis of the traditional sources. It may be noted that, whatever we call the five classes, they are not as such categories of sources of international law. Therefore their conception as a supplement to Article 38 may give rise to discussion. What one would expect from a 'supplement' is a straightforward list of new sources. The author gives a complex but far more practical solution which is inspired basically by the 'shift from form towards formlessness' which is under way in the international law-making process. The suggested five classes provide us with criteria against which all the international instruments we wish to classify in relation to sources of international law should be examined. The final conclusion is supposed to give an answer as to what kind of international instrument we are dealing with. The criteria applied by the author are being used to some extent as rules of interpretation of legal acts. Therefore their application in a slightly changed form should not create many difficulties. Analysing the content of the five criteria, van Hoof gives some concrete illustrations, e.g. the Helsinki Final Act, the General Assembly Resolution on the establishment of UNCTAD, the Resolution containing the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, and the Resolution on Official Development Assistance.

In a final remark the author confesses that the various classes of manifestation have been outlined *in abstracto*. It is no criticism to say that this is a feature of the whole book, which is more theoretical than practical in its overall approach. The book is likely to surprise a reader who may expect a more traditional approach. This cannot be counted a disadvantage. It is hoped that the author's concept will be developed further, in particular in the direction of transnational relations.

Z. WLOSOWICZ

Die Internationalisierung staatsfreier Räume. Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht: *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Volume 85). By RÜDIGER WOLFRUM. Berlin: Springer Verlag, 1984. xx + 757 pp. DM 188.

The literature dealing with the UN Convention on the Law of the Sea is voluminous. One must therefore concentrate on the important new contributions to this continuing discussion. Professor Wolfrum's book which, despite the title *The Internationalization of Common Spaces outside National Jurisdiction: The Development of an International Administration for Antarctica, Outer Space, the High Seas and the Deep Sea-Bed*, concentrates mainly on the law of the sea (pp. 328-680), certainly has all the qualities of an important contribution. Moreover, because it is not limited to questions of the internationalization of the high seas (pp. 101-268) or to the results of the Third UN Conference on the Law of the Sea, but also deals with the internationalization of spaces like the Antarctic (pp. 30-100) and outer space (pp. 269-327), it is a valuable, structured description of this new field of codification in international law.

Professor Wolfrum concentrates on the consequences of the newly introduced principle of the common heritage of mankind, which will in the future dominate the use of the

deep sea-bed, as well as of the moon and other celestial bodies. First, this principle, which involves State responsibility *vis-à-vis* the world community, will restrict States' sovereignty by limiting their freedom of action. Secondly, the common heritage principle in international law leads to the principle of social adjustment, developed to equalize the utilization possibilities of international 'commons'. Thus the author concludes that the principle of sovereign equality of States needs to be reconsidered as far as the use of the international commons is concerned. All this will lead to a profound change in the functions of international organizations. This trend can be seen, for example, in the powers and functions attributed to the Sea-Bed Authority by the Convention on the Law of the Sea, which do not find any equivalent in the existing law on international organizations.

Professor Wolfrum points out that the legal development concerning the deep sea-bed, the high seas, Antarctica and outer space have a common origin. The regimes concerning these areas create State obligations to satisfy international community interests and differ from the traditional law governing the utilization of international commons in which the recognition of community interests was unknown. The only difference between these new regimes lies in the fact that, with respect to the deep sea-bed, the specification of international common interests has reached a more advanced stage and it has been brought under a territorial internationalization, whereas the other regimes tend to follow a functional internationalization. This is regarded by Professor Wolfrum as proof for his initial hypothesis that an international administrative law concerning international commons is developing. If it is true that international organizations are gaining more and more power and rights which are limiting the sovereignty of States, then another problem not yet exhaustively discussed arises as to the extent to which international organizations are bound by customary international law and can use customary law as a basis for exercising their rights. (Cf., for example, A. Bleckman, 'Zur Verbindlichkeit des allgemeinen Völkerrechts für Internationale Organisationen', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 37 (1977), p. 107.) For example, is it possible that the organs of the Deep Sea-Bed Authority may use force against States or private investors who are not observing the regime of the deep sea-bed? The author emphasizes that Article 2 (4) of the UN Charter and the Friendly Relations Declaration of 24 October 1970 of the General Assembly, which originally applied only to States, also affects the rights and duties of international organizations like the Deep Sea-Bed Authority, which is to be established.

Both approaches to the system of co-operation among States and the establishment of an international organization (institutionalized co-operation), enshrined in the different regimes of international commons, serve the same objective although their impact upon the established principles of international law is different.

The establishment of State obligations to provide for co-operation and assistance which benefit only one group of States involves a departure from the principle of reciprocity. Limiting the power of individual States by imposing upon them obligations to serve community interests and the needs of other States constitutes the other characteristic feature of the developing regime for these international commons. Professor Wolfrum is indeed right to see the regulations concerning the deep sea-bed as a starting-point for the international community to develop as a true community, based on the solidarity between its members.

HANS-JOACHIM MENGEL

DECISIONS OF BRITISH COURTS DURING 1985-6 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. PUBLIC INTERNATIONAL LAW*

Statehood—Republic of Ciskei—effect of non-recognition by British Government—whether Ciskei a subordinate authority of South Africa—whether Ciskei has standing to be sued in British courts

Case No. 1. Gur Corporation v. Trust Bank of Africa Ltd., [1986] 3 WLR 583, [1986] 3 All ER 449, CA, reversing Steyn J. In 1983 the plaintiff contracted with the Republic of Ciskei, one of the South African 'bantustans' or 'independent homelands', to build a hospital and two schools. Under the contract with the plaintiff a guarantee of 10 per cent of the contract price was required to be made available to cover claims by the Republic of Ciskei for the cost of repairing defects in the building. Accordingly the sum of US \$300,000 was lodged with the defendant bank as security for a guarantee given by the bank to the Republic of Ciskei. The Republic made a claim on the guarantee, but it was disputed whether the claim had been made in proper form before the guarantee expired. None the less the defendant Bank refused to return the \$300,000 to the plaintiff until the question of the validity of the claim was settled. The plaintiff sued the defendant, seeking the return of the deposit; the defendant in turn served a third party notice on the Republic of Ciskei, seeking to have determined as against it the validity of its claim. The Republic of Ciskei counterclaimed for a declaration that it was entitled to the deposit.

The apparently tranquil commercial surface of the dispute was, however, disturbed when Steyn J raised the question whether the Republic of Ciskei as an unrecognized foreign State had standing to sue and be sued in an English court. Understandably none of the three parties wished to raise the point, since the consequence of the Republic's lack of standing would have been that the English courts could not have resolved the dispute in a way which bound it. The point having been raised by the trial judge, it was then fully argued. In the event Steyn J held that the Ciskei had no standing as a 'person' or 'party' before UK courts, and that none of the possible exceptions to the lack of standing of an unrecognized foreign State applied. The court accordingly lacked jurisdiction to adjudicate on the third party proceedings, but it did have jurisdiction as between the original parties, and in fact Steyn J made a declaration that the purported claim by the Republic on the deposit failed to comply with the terms of the guarantee and was ineffective. From this decision both the Bank and the Republic appealed.

Before Steyn J, two different 'exceptions' were relied on as a basis for the Republic's standing. The first was the possible exception, adumbrated by Lord Wilberforce in the *Carl Zeiss* case,¹ for 'routine' or 'ordinary' transactions of

* © Professor James Crawford, 1987.

¹ *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 AC 853, 954.

unrecognized States and governments. Steyn J treated this as an 'individual rights' exception, and rejected it in the circumstances of this case on the basis that the Republic itself was directly involved as a litigant. He said:

One qualification of the general principles may be the necessity for English courts to take cognisance of governmental acts of unrecognised states which directly affect family or property rights of individuals. There is no binding English authority supporting such a qualification of the general principles. Lord Wilberforce in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* regarded it as a possible avenue for future development . . . It is manifest, however, that such a development, if recognised, cannot assist the Ciskei in the present case. In the present case the court is not confronted with the necessity of doing justice to individuals who were caught up in a political situation which was not of their making. It is true that the principal contract was for the building of a hospital and two schools. The dispute is, however, commercial in character and involves monetary claims between the Ciskei and a South African bank. The Ciskei is directly impleaded, and the Ciskei has brought a counterclaim . . . [Counsel] emphasised what he described as the unfortunate commercial consequences if the Ciskei has no standing in the English courts. He said that the guarantee is commercial paper issued out of the City of London. Justice demands, he suggested, that English courts should assume jurisdiction. This argument ignores the countervailing considerations of public policy, political as they are, which underlie the general principles. If along the lines discussed by Lord Wilberforce in the *Carl Zeiss* case an exception should be grafted onto the established principles in favour of individuals who have been caught up in their family and property rights in a political situation not of their own making, it hardly avails the two parties directly affected here. Neither the bank, versed as it is in the business of risk-taking, nor the Ciskei could have been ignorant of the potential effect of the Ciskei's status on their remedies in foreign courts. After all, it is common knowledge that the so-called independent homelands do not enjoy the courtesies and privileges of the community of nations. Moreover, it was common ground that the dispute between the Ciskei and the bank can be settled in the courts of South Africa and/or the Ciskei.

The parties to the contracts involved here could conceivably have structured their contractual arrangements in a different way by the intercession of other parties which would have enabled them to avoid in the English courts the consequences of the lack of standing of the Ciskei. That is, however, no reason to bend established rules in a way which would implicitly amount to judicial recognition of the Ciskei. And recognition of a new state is the exclusive prerogative of the Crown in its executive function.²

In fact, not all the formulations of the possible exception outlined by Lord Wilberforce in the *Carl Zeiss* case relate to rights of private parties, as distinct from the unrecognized State or government. Lord Wilberforce referred rather to 'private rights, or acts of everyday occurrence, or perfunctory acts of administration'. Moreover, rights of private parties, in cases where the standing of unrecognized States or governments is involved, are very likely to involve rights which are (wholly or partly) rights against that State or government. Indeed it was precisely the plaintiff's right to be free of the Republic of Ciskei's claim that was at stake here (and correlatively the defendant's right to return the money to the plaintiff without being liable to the Republic if it did so). For such rights to exist or be secured they may have to be adjudicated on *vis-à-vis* the unrecognized State or government itself. However, the rule that an unrecognized State or government has no standing to sue or be sued has always been stated in absolute terms, and, although Steyn J did not very clearly draw the distinction, it seems that that rule

² [1986] 3 WLR 583 at pp. 589, 592.

takes priority over any exception for 'private rights' or perfunctory acts of administration.

Although the point was argued on appeal, the Court did not discuss it, Sir John Donaldson MR merely observing in passing that he saw

... great force in [Lord Wilberforce's] reservation, since it is one thing to treat a state or government as being 'without the law,' but quite another to treat the inhabitants of its territory as 'outlaws' who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day-to-day activities having legal consequences. However, that is not this case.³

The case thus centred around the second 'exception' to the rule that unrecognized States or governments have no standing, that is to say, the rule represented by the ratio of the *Carl Zeiss* case itself. In that case the House of Lords treated the executive certificate as binding them to hold that the Soviet Union was at all relevant times entitled to exercise governmental authority in the territory of the German Democratic Republic, and that the German Democratic Republic was thus a subordinate or local governing authority in the area with the capacity to enact the law in question. In the present case the executive certificate was more equivocal. It said, in relevant part, that:

... beyond making it clear that it has not recognised as independent sovereign states Ciskei or any of the other homelands established in South Africa Her Majesty's Government has not taken and does not have a formal position as regards the exercise of governing authority over the territory of Ciskei. Her Majesty's Government does not have any dealings with 'the Government of the Republic of Ciskei' or with the 'Department of Public Works, Republic of Ciskei'. Her Majesty's Government has made representations to the South African Government in relation to certain matters occurring in Ciskei and others of the Homelands to which South Africa has purported to grant independence, notably on matters relating to individuals, but has not in general received any positive response from the South African Government.⁴

Understandably, Steyn J treated the difference as crucial. In *Carl Zeiss* the House had been compelled by the certificate to treat the Soviet Union as entitled *de jure* to exercise governmental authority at all relevant times. But this was not so here, unless some inference was to be drawn from the fruitless representations to which the final sentence of the certificate referred, or from the reference to 'purported' independence. Thus Steyn J concluded that:

... there is an essential difference between the *Carl Zeiss* case and the present case. In *Carl Zeiss* there was a conclusive certificate that the U.S.S.R. still exercised governing authority in the G.D.R. In the present case the certificate records that Her Majesty's Government 'does not have a formal position as regards the exercise of governing authority over the territory of the Ciskei.' It was suggested that on this point the certificate is less than clear. I disagree. It is plainly a carefully considered certificate, given by the executive to the judiciary, and its meaning is beyond question. It was also suggested that Her Majesty's Government does not have a formal position on the relevant matter, because it is no longer its practice to recognise governments. This explanation may be right. The fact is, however, that there is no certification to the effect that South Africa is still the governing authority in the Ciskei. Inevitably, therefore, the bank and the Ciskei must rely on other evidence for the proposition that South Africa still exercises governing authority in the Ciskei. In my judgment, there are no materials available before me which warrant such an

³ At p. 601.

⁴ At p. 588.

inference. Indeed, such materials as have been placed before me point the other way. As I have already mentioned, the Ciskei placed before me the Status of the Ciskei Act 1981. It was submitted that on this point I may not look at it. Clearly, it is not permissible to have regard to any declarations of the South African state or of the Ciskei, in so far as they conflict with executive certificates of Her Majesty's Government. However, on the point presently under consideration those executive certificates are silent. In the circumstances it is therefore permissible to refer to the Status of the Ciskei Act 1981. Section 1 (2) of the Act unambiguously provides that the Republic of South Africa shall cease to have any authority over the Ciskei. I readily accept that there is a distinct possibility that the reality of the relationship between the Ciskei and South Africa may be very different from the impression created by the South African statute. But there are no materials from which the inference can be drawn that the Republic of South Africa is still the governing authority of the Ciskei. Certainly, it is impossible to infer from the mere fact that the Ciskei is unrecognised by Her Majesty's Government that South Africa is still the governing authority in the Ciskei territory, or so viewed by Her Majesty's Government. After all, recognition has in the past from time to time been withheld by Her Majesty's Government on political grounds unrelated to the question whether the entity is in truth an independent state . . .⁵

The Court of Appeal managed to disagree, in part because they were able to gather from the reference to 'representations to the South African Government', in the certificate, the proposition that the UK Government did indeed recognize South Africa as continuing to exercise sovereignty over the territory of the Ciskei, and in part because they felt able to sever those provisions of the Status of Ciskei Act 1981 (especially section 1 (2)) which proclaimed Ciskei 'independent', from those (especially section 3 (1)) which 'delegated' legislative power to the Legislative Assembly of Ciskei. The reasoning was clearly set out by Sir John Donaldson MR. Referring to the executive certificates in the *Carl Zeiss* case and in the present case, he said:

There is, however, an apparent contrast between the two certificates when it comes to entitlement to exercise governing authority. In each case the certificates are conclusive that the G.D.R. or, as the case may be, the Republic of Ciskei are not recognised as independent sovereign states. It follows from this that the courts must hold that neither the G.D.R. or its government nor the Republic of Ciskei or its government was in law capable of an executive, administrative or legislative act at the relevant times, unless enabled by some superior authority. In the case of the G.D.R., the certificate pointed expressly to where that superior authority was to be found, namely the sovereign state of the U.S.S.R. The question for our consideration is whether the Ciskei certificates, either alone or taken in conjunction with other evidence, point to any superior authority, of which the courts can take cognizance, as supplying the requisite authority to enable the Government of the Republic of Ciskei to undertake executive, administrative or legislative acts. In reviewing and evaluating that other evidence, we must disregard any declarations or Acts of the Republic of South Africa or of the Republic of Ciskei which conflict with the certificates of the Secretary of State, just as the House of Lords disregarded such declarations by the Government of the U.S.S.R. . . . We must disregard section 1 (1) of the Status of Ciskei Act 1981 which declares the Republic of Ciskei to be a sovereign and independent state ceasing to be part of the Republic of South Africa and section 1 (2) which declares that the Republic of South Africa will cease to exercise any authority over the territory since this subsection is clearly consequential upon subsection (1). We must also disregard section 1 (1) of the Republic of Ciskei Constitution Act 1981. However, we can, and I think must, take cognizance of the remainder of those Acts, notwithstanding that, absent those sections,

⁵ At pp. 590-1.

they may take on a somewhat different character. Thus section 3 (1) of the Status of Ciskei Act 1981, which provides:

'The Legislative Assembly of Ciskei . . . may . . . make laws (including a constitution) for the Ciskei in the manner prescribed by the said Act, and may in any such law provide for the making of such laws by any authority other than the said Legislative Assembly,'

becomes a straightforward delegation of legislative power which could be revoked in the same way as it had been conferred, namely by a subsequent legislative Act of the Republic of South Africa.

We also know the constitutional history of the territory of the Ciskei, to which I have already referred, and we can take judicial notice of the fact that the Republic of South Africa is a sovereign state, recognised by Her Majesty's Government, and that it was entitled to exercise sovereignty over the territory of the Ciskei until the passing of the Status of Ciskei Act 1981. If then we disregard section 1 of that Act, as we must, there are no materials from which we could infer that this situation has changed. Indeed, the certified fact that 'Her Majesty's Government has made representations to the South African Government in relation to certain matters occurring in Ciskei and others of the Homelands to which South Africa has purported to grant independence' gives rise to a clear inference that Her Majesty's Government regards the Republic of South Africa as continuing to be entitled to exercise sovereign authority over the territory . . . It follows that in my judgment the legal status of the Republic of Ciskei and its government is indistinguishable from that which obtained in the case of the G.D.R. and its government at the time with which the *Carl Zeiss* case was concerned.⁶

The ingenuity of this is remarkable—and continues the tradition of 'ingenuity' in dealing with executive certificates for which the *Carl Zeiss* case was equally remarkable. Moreover, it may well be appropriate—apart from any issue of sanctions or any extended policy of non-recognition flowing from UN instruments—to treat Ciskei and the other bantustans as local governing bodies of South Africa, which in international law is no doubt what they are.⁷ But the process of severing one part of an 'independence statute' from another, equally essential, part is a dubious one. It is one thing to be bound by a certificate to uphold a fiction—or for that matter, a rule of international or national law. It is quite another to mix fact and fiction in varying quantities, however satisfactory the result. That process is better entrusted to novelists than judges. The point may be tested by assuming that the Ciskei had subsequently declared its 'unilateral' independence from South Africa, repudiated the Status of Ciskei Act 1981 and begun a campaign for the destruction of apartheid. It strains credulity to believe that the courts—in the absence of a clear executive certificate—would continue to treat Ciskei as a subordinate authority of South Africa in such circumstances. But if not, they would in effect be giving Ciskei more status as an engine of apartheid than as an opponent of it. International and national policies towards the situation are thus in a state of underlying tension, despite the apparent agreement on the issue of status in this case.

Perhaps the central difficulty facing the courts in these cases, however, arises from the fact that the new policy of the UK with respect to recognition does not involve an abandonment of the *idea* that recognition is decisive: the UK Government has merely decided not to inform the courts of its attitude to new governments, leaving them to infer from what will usually be partial or

⁶ At pp. 601-3.

⁷ See, e.g., J. Crawford, *The Creation of States in International Law* (1979), pp. 222-7.

incomplete information what that attitude is.⁸ The process of speculation and guesswork which characterized this case is thus not accidental, but is likely to recur. Nourse LJ managed to be both loyal and critical in his comment that:

The rule that the judiciary and the executive must speak with one voice presupposes that the judiciary can understand what the executive has said. In most cases there could hardly be any doubt in the matter. But in a case like the present, where there is a doubt, the judiciary must resolve it in the only way they know, which is to look at the question and then construe the answer given. It is not for the judiciary to criticise any obscurity in the expressions of the executive, nor to inquire into their origins or policy. They must take them as they stand.⁹

As this suggests, the executive certification policy at present combines the worst of both worlds: the certainty of the old practice, where the executive gave the courts answers to their questions and the courts followed them, has gone, in cases of recognition of governments and increasingly in other cases, but it has not yet been replaced by a practice which allows the courts to look at the real world, including those aspects of it which are expressed or reflected in rules of international law.¹⁰

Iran-US Claims Tribunal—decision invalid under law of third State where award given—decision allegedly vitiated by errors of law and fact—whether decision gives rise to issue estoppel in English law

Case No. 2. Dallal v. Bank Mellat, [1986] 1 QB 441, [1986] 2 WLR 745, [1986] 1 All ER 239, Hobhouse J. This case raised the interesting, and in modern English law novel, point whether an international arbitration pursuant to a treaty between a private party and a foreign State is capable of giving rise to an issue estoppel. It is perhaps not surprising that the point had not been raised earlier, since most of the earlier international mixed arbitral tribunals had taken the orthodox form of claims presented by the State of nationality against the foreign State. The Iran-US Claims Tribunal, on the other hand, is the most striking example of the tendency for arbitrations at the international level to deal directly with claims presented by individuals. The utility of the settlement of disputes through such means would be undermined if the decisions of such tribunals were not in principle final and capable of recognition in national courts. Hobhouse J's decision in this case that decisions of the Iran-US Claims Tribunal did give rise to an issue estoppel is thus to be welcomed.

Dallal claimed before the Tribunal a sum of \$400,000 on the basis of two

⁸ Cf. C. Warbrick, 'The New British Policy on Recognition of Governments', *International and Comparative Law Quarterly*, 30 (1981), pp. 568, 583.

⁹ [1986] 3 WLR 583 at p. 604.

¹⁰ Another interesting case in the year under review, *Kingdom of Spain v. Christie, Manson & Woods Ltd.*, [1986] 1 WLR 1120, involved the standing of a foreign State to sue for a declaration that certain export licences relating to a Goya painting were forgeries. Spain had no proprietary interest in the painting, but claimed it had been illegally exported. Browne-Wilkinson VC declined to strike out the proceedings, on the basis that it was 'arguable . . . that the continued use of forged documents of the Spanish state, purporting to show the lawful export of works of art from Spain, is directly comparable to the false currency which was under consideration in the *Emperor of Austria* case' (*Emperor of Austria v. Day* (1861), 3 DeG F & J 217): at p. 1131. Unfortunately, the case was decided only on the preliminary point that the claim for a declaration was not unarguable. The dividing line between proceedings to enforce 'prerogative' or 'public' as distinct from 'proprietary' rights of a foreign State thus remains as obscure as ever.

dishonoured cheques drawn on the International Bank of Iran, the predecessor of Bank Mellat, both of which were Iranian Government instrumentalities. The Tribunal held that there were strong suspicions that the cheques (which were drawn at the time of the Iranian revolution in exchange for rials) were part of a foreign exchange contract illegal under Iranian law and unenforceable under Article VIII (2) (b) of the Bretton Woods Agreement of 1945 (to which both Iran and the US were parties).¹¹ The Tribunal, by a majority, accordingly disallowed the claim.¹² A subsequent application for rehearing was rejected unanimously by the Tribunal.¹³ Dallal then commenced proceedings in England against the Bank, which was amenable to the jurisdiction because it carried on business in London. The Bank applied to strike out the proceedings as an abuse of process, on the ground, *inter alia*, of issue estoppel.

Hobhouse J identified two issues to be decided in this respect: whether the Tribunal was 'a court of competent jurisdiction', within the meaning of the English authorities on issue estoppel (which apply equally to arbitrations),¹⁴ and whether there were special circumstances which made it unjust to apply the principle. On the first point he distinguished in turn between the Tribunal proceedings as a consensual and a 'statutory' arbitration.

The difficulty with treating the arbitration as consensual arose from the fact that Dutch law, which was arguably the proper law of the arbitration, required an arbitral agreement to be in writing, signed by the parties, and to contain certain minimum information about the arbitration.¹⁵ The only agreement here was that constituted by Dallal's application to the Tribunal, against the background of the Tribunal's rules. Although this would have been sufficient if English law had been the proper law of the arbitration, it was thus strongly arguable that the Tribunal's award was invalid under Dutch law. As Hobhouse J concluded:

If, as I consider, the proper law of the agreement was Dutch law, then the agreement was a nullity because it did not comply with the requirements of the Dutch code. It follows that if the award of the tribunal at The Hague is to be recognised in England as an arbitral award, it cannot satisfy the requirements of the New York Convention [on] the Recognition and Enforcement of Foreign Arbitral Awards (Cmnd. 6419), or English conflicts of laws rules. Both the New York Convention and the English rules that would apply independently of the convention require that the arbitrators shall have acquired their jurisdiction pursuant to an arbitration agreement which is valid according to its proper law. The defendants here cannot point to any such agreement.

The defendants sought to argue further that the proper law of the arbitration agreement might be public international law. But what I am concerned with here at this point of the argument is not an agreement between states but an agreement between private law individuals who are nationals of those states. If private law rights are to exist, they must exist as part of some municipal legal system, and public international law is not such a system. If public international law is to play a role in providing the governing law which

¹¹ *United Nations Treaty Series*, vol. 2, p. 39.

¹² Case No. 149, Award of 10 June 1983; *Yearbook of Commercial Arbitration*, 8 (1983), p. 264; summarized in *American Journal of International Law*, 78 (1984), p. 235.

¹³ Decision of 12 January 1984: *Yearbook of Commercial Arbitration*, 10 (1985), p. 306.

¹⁴ *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb*, [1966] 1 QB 630.

¹⁵ Under Article 623 of the Code of Civil Procedure, set out at [1986] 1 QB 441 at p. 447. No special provision had been enacted in Dutch law to provide for the Tribunal or the enforceability of its awards: *ibid.*

gives an agreement between private law individuals legal force, it has to do so by having been absorbed into some system of municipal law. Therefore, the defendants' argument did not provide them with an escape from the necessity to identify the municipal legal system which was the proper law of the agreement to arbitrate.

It follows that, if the sole justification for the recognition of the proceedings and award of the tribunal at The Hague has to be derived from the application of the ordinary principles applicable to consensual arbitration, then the foundation of the defendants' case based upon those proceedings is effectively destroyed.¹⁶

Having rejected the defendant's argument on one ground, however, Hobhouse J went on to accept it on another. He said:

It would have been convenient and advantageous if the awards of The Hague tribunal had satisfied the requirements for recognition under the New York Convention. . . . Enforcement in other countries, if necessary, would have been simplified. However, tribunals can achieve their competence in a number of ways. In origin the arbitration bore a closer resemblance to what in municipal law would be described as a statutory arbitration. The arbitral tribunal and its jurisdiction is defined not by any choice or agreement of the parties but by the statute itself. The element of choice is simply the choice of the claimant who chooses to make a claim before the arbitral tribunal. Such a situation is, therefore, more accurately described as one where the claimant invokes the jurisdiction of the tribunal and the respondent submits to it . . . If then the proceedings at The Hague are to be regarded as proceedings in a 'statutory' arbitration, the question arises: what is the 'statute'? The plaintiff submits that such an arbitration can still only validly exist under the law of the jurisdiction within which it takes place; that is to say, the law of the seat of the arbitration, in this case the law of the Netherlands. If this is right, it must follow that the invalidity of these arbitration proceedings under Dutch law closes this door as well. Whether or not some principle of Dutch law could be invoked to give a validity to these arbitration proceedings as analogous to a 'statutory' arbitration is at the best an open question: I am not presently satisfied that there is any such principle of Dutch law. It is beyond argument that there is no legislative or other authority under Dutch municipal law for these arbitration proceedings.

The plaintiff then says that the statutory authority, or authority analogous to statute, cannot be looked for elsewhere, and certainly cannot be looked for in international law. I do not accept this argument. The jurisdiction and authority of the tribunal at The Hague was created by an international treaty between the United States and the Republic of Iran, and was within the treaty-making powers of the governments of each of those two countries. Each of the parties was respectively within the jurisdiction and subject to the law-making power of one of the parties to the treaty. Further, the situs of all the relevant choses in action is within the jurisdiction of one or other of the two states which are parties to the treaty. Again, the municipal legal systems of each of the relevant states recognise the competence of the tribunal at The Hague to decide the relevant disputes. Accordingly, the arbitration proceedings at The Hague are recognised as competent not only by competent international agreement between the relevant states, but also by the municipal laws of those states. It would be a surprising result if the courts of this country felt constrained to hold that the proceedings were nevertheless incompetent . . . In the present case there are two systems of municipal law with the requisite international competence which give validity to the arbitration proceedings. There is no reason in principle why that validity should not be recognised by the English courts.¹⁷

Hobhouse J went on to refer to international practice and to certain Privy Council decisions recognizing the validity of an adjudication in a third State valid

¹⁶ At pp. 455-6.

¹⁷ At pp. 457-8.

under the municipal law of the States parties (or whose nationals were parties) and under international law.¹⁸ As he concluded:

First, the competence of a tribunal can be looked for and found in international law and practice. If under international law such a tribunal is competent, its competence ought to be recognized by English courts.

Second, under international law, competence is most often found to have been conferred by some treaty. But this is not invariably the case and some less formal acquiescence in an established practice may suffice to demonstrate the competence in international law. The Ottoman Porte had acquiesced in the jurisdiction of the consular courts within Ottoman territory. So also in the present matter has the Dutch Government acquiesced in the operations of the arbitral tribunal within the territory of the Netherlands.

Thirdly, where a court or other tribunal has been set up by a subject's own sovereign government, albeit within the territory of another state, that subject cannot be heard to say that the act of his own government was incompetent . . . In the present case the governments of both the United States and Iran have authorized their respective nationals to arbitrate before the tribunal at The Hague and regard the decisions of that tribunal as competent.

Fourthly, a person can make such a tribunal competent by voluntarily resorting to it (with the consent of his sovereign) . . . These decisions clearly illustrate that competence can be derived from international law and that international comity requires that the courts of England should recognize the validity of decisions of foreign tribunals whose competence is so derived.¹⁹

The decision is an intriguing mixture of dualistic premisses and a willingness to give effect to decisions which were, in a certain sense, taken at the international level. That it involved taking international law into account rather than giving it direct effect was made clear, for example, in this passage:

I hold that the tribunal was a competent tribunal in respect of the present parties and the present matter. I do not have further to decide whether or not that decision gave rise to substantive rights as between the parties; if I were to do so, I would have to say under what municipal law system those rights, which must by definition be private law rights, would exist. It may be that those rights could exist both under the law of the United States and under the law of Iran . . . I have not had to embark on that enquiry because what I am doing . . . is giving effect to an English law procedural remedy in respect of a procedural complaint that is recognized by English law. It is the determination of the relevant disputes on the previous occasion by a tribunal of competent jurisdiction which gives rise to and justifies that procedural complaint.²⁰

Thus the English courts continue to adhere to the view that international law cannot of its own force govern relations between private parties:²¹ but the adverse consequences of that view (which may none the less represent the present state of

¹⁸ He referred to the tribunal set up under the Treaty of Munster 1648, the Jay Treaty of 1794, and to two Privy Council decisions involving Consular Courts under the system of capitulations in the Ottoman Empire: *The Laconia* (1863), 2 Moo NS 161 and *Messina v. Petrocchino* (1872), 4 LR PC 144. *The Laconia* involved a British Consular Court in Constantinople, and was therefore partly at least influenced by the Foreign Jurisdiction Act 1840 (6 & 7 Vic. c. 94). But *Messina v. Petrocchino*, which involved a dispute between foreigners before a Greek Consular Court situated in a third State, was directly in point: indeed it represented something of a triumph for the researches of counsel.

¹⁹ [1986] 1 QB 441 at pp. 460-2.

²⁰ At p. 462.

²¹ Cf. *Bank Mellat v. Helleniki Techniki SA*, [1984] 1 QB 291, 301 *per* Kerr LJ cited by Hobhouse J, [1986] 1 QB 441 at p. 458.

international law also) can be mitigated, at least, by the incorporation of international law into English law in appropriate contexts.²²

The second issue was whether there were special circumstances in this case justifying the court in not applying the principle of issue estoppel. Hobhouse J referred to the dissenting opinion of the US arbitrator in the *Tribunal* with some sympathy,²³ and on the key evidentiary point the decision of the *Tribunal* was at least eccentrically expressed:²⁴ it may be that foreign arbitrators are not used to 'appeal-proofing' their decisions! None the less, Hobhouse J had no doubt that special circumstances had not been shown. He said:

The proceedings before the tribunal were proceedings of the character of an arbitration in which the disputes of the parties were being decided in accordance with a proper scheme of procedure and in accordance with the application of appropriate rules of law. Although the decision and the reasons that the majority gave for it are criticised by the plaintiff, his criticisms do not go so far as even to allege any breach of the principles of natural justice, nor any conduct of the tribunal or of the respondents to the arbitration which would justify a court of this country in declining to recognize the award.²⁵

Jurisdiction to restrain foreign proceedings—British airline's anti-trust action in United States—defendant having no relevant presence or activities in United States—whether absence of evidence of defendant's involvement in conspiracy relevant

Case No. 3. Midland Bank plc v. Laker Airways Ltd., [1986] 1 QB 689, [1986] 2 WLR 707, [1986] 1 All ER 526, CA. In *British Airways Board v. Laker Airways Ltd.*²⁶ the House of Lords affirmed the English courts' power to restrain foreign proceedings on grounds of unconscionability, but refused to exercise that power in relation to a US anti-trust action claiming treble damages, for an alleged conspiracy to put Laker Airways out of business. The relevant business was the offering of low cost fares on passenger routes between the US and Europe. Thus in *Laker* there was both a clear connection between the US and the anti-trust litigation, and some evidence of a conspiracy directed against Laker Airways. But Parker J (whose decision was reversed by the Court of Appeal but restored by the House of Lords) had referred to a 'hypothetical case' where

... two United Kingdom companies, neither of which traded in or to America, openly made a price agreement lawful in this country but ... the purchasers of their goods in this country exported them to the United States. Suppose further that some time later both United Kingdom companies appointed agents in the United States and thus enabled United States proceedings to be served on them and that a United Kingdom company, with a place of business in the United States who had purchased the goods, launched an

²² P. F. Kunzlik, *Cambridge Law Journal*, 45 (1986), pp. 377, 379, criticizes Hobhouse J for relying on nineteenth-century decisions rather than on present international law. It is doubtful whether the criticism is justified in this case. The Privy Council's references to the capitulation system and to the distinction between Christian and non-Christian States (e.g. *Messina v. Petrocchino* (1872), LR 4 PC 144 at p. 158) are of course archaic, but the basic principle of curial jurisdiction recognized there continues to be valid in international law.

²³ [1986] 1 QB 441 at p. 450. On the other hand, the English interpretation, at least, of Article VIII (2) (b) provides strong support for the defendant's main legal argument: see *Mansouri v. Singh*, [1986] 1 WLR 1393 (below, p. 421).

²⁴ Hobhouse J described it as 'idiosyncratic': [1986] 1 QB 441 at p. 455.

²⁵ [1986] 1 QB 441 at p. 463.

²⁶ [1985] AC 58; this *Year Book*, 55 (1984), p. 331.

anti-trust action. In such circumstances it appears to me that justice might well demand that the plaintiff be prevented from pursuing an action in respect of acts performed wholly in this country and wholly lawful here even though, if so prevented, the plaintiff would be left without a remedy. To allow such an action to proceed at the suit of a United Kingdom company would involve exposing United Kingdom defendants to an action based on what is regarded here as an exorbitant assertion of extra-territoriality . . . [I]f in the present case, it were established that in pursuing its claim in the United States against the present plaintiffs, Laker were a party to any invasion of sovereignty it would follow that an injunction should be granted, or at least that the position constituted a powerful factor in favour of the grant of an injunction.²⁷

In the present case, which bore some resemblance to that hypothetical case, Laker alleged that two English banks were parties to the conspiracy and therefore also liable under US anti-trust law. Midland Bank was Laker's English banker, and the main organizer of a failed English rescue bid. The second plaintiff was a subsidiary of Midland. At a crucial stage they withdrew financial support from Laker, and appointed receivers. The plaintiffs had no relevant business connection with the US, and none of their acts said to involve them in the conspiracy took place there.

The problem with granting the injunctions was twofold. First, the argument that there was no evidence of a factual nexus between the Bank and the US could be met by the statement of Lord Diplock in *Laker*, where he said that to determine the facts was—except in the clearest case of vexatious or frivolous proceedings—a matter for US courts.²⁸ Secondly, the argument that the US proceedings involved an excess of jurisdiction depended on the absence of any sufficient evidence of a connection between the Bank and the conspiracy, and determining whether such evidence existed was a matter for the US courts. (It is clear that the English courts would claim both civil and criminal jurisdiction over conspirators provided that one of the conspirators performed acts within the jurisdiction pursuant to the conspiracy.²⁹)

None of their Lordships in the Court of Appeal provided any very clear answer to these objections, although the Court unanimously granted the injunction sought by the Bank. They agreed that assessing the evidence of the Bank's involvement was a matter for the US and not the English courts. Thus they did not decide the case on the ground that the proceedings were so obviously frivolous or vexatious that intervention was necessary.³⁰ Rather they interpreted the House of Lords decision in *Laker* as based upon a submission to US jurisdiction, a submission effected by carrying on an airline business under US law and under the Bermuda 2 Agreement between the UK and the US.³¹ This submission, they held, was absent in the present case. In Lawton LJ's words:

. . . the plaintiff banks were in a wholly different situation. Their connection with Laker Airways arose from banking transactions in England which were governed by English law

²⁷ [1983] 3 All ER 375, at pp. 388-9.

²⁸ [1985] AC 58 at pp. 86-7.

²⁹ *DPP v. Doot*, [1973] AC 807 at p. 825 (Viscount Dilhorne); at p. 827 (Lord Pearson); at pp. 833, 836 (Lord Salmon). See also this *Year Book*, 46 (1972-3), pp. 425-6.

³⁰ [1986] 1 QB 689 at p. 700 *per* Lawton LJ; at p. 703 *per* Dillon LJ; at p. 713 *per* Neill LJ.

³¹ Agreement between the Government of the UK of Great Britain and Northern Ireland and the Government of the US of America concerning Air Services (1977) (Cmnd. 7016); *United Kingdom Treaty Series*, No. 76 (1977).

and were intended to be so governed. There was no connection between them and any airlines operating in the United States by any arrangement comparable to the Bermuda 2 Treaty. They did nothing in the United States which would have been governed by the United States anti-trust legislation. At the material time, save on the international inter-bank market, they themselves had no banking business in the United States. Midland Bank's subsidiary bank in California, which had a separate legal existence and over which they had no managerial control, had no connection of any kind with the airlines involved in the liquidator's anti-trust suit . . . It follows, so it seems to me, that it cannot be said that had plaintiff banks have submitted themselves to the United States anti-trust legislation in the way that British Airways and British Caledonian Airways had done.³²

But jurisdiction, although it can be based on submission, need not be: where there are substantive links between the parties and the *forum* their intention or submission is normally irrelevant.

The key question is whether it is possible to base an injunction against foreign proceedings on the internationally exorbitant jurisdictional basis for those proceedings, or whether it is necessary to establish some personal (or 'private law') inequity as between the parties. Dillon LJ seems to have taken the first of these two routes. He said:

The basis of an anti-trust suit under the present case is that there has been a conspiracy to injure someone's business in the United States by unfair trading on the part of the conspirators. But, by the analogy of the hub and spokes, the net is cast much wider and the United States courts claim that any person in any part of the world who, with knowledge of the primary conspiracy, takes steps in his own country in defence of his own legitimate interests may be held to have made himself a party to the conspiracy and to be liable to an anti-trust suit before a United States jury in a United States court even though what he did subjected him to no civil or criminal liability by the law of his own country . . . The starting point, as I see it, is that Laker Airways' cause of action in the existing anti-trust suit and in the proposed anti-trust suit against the plaintiff banks arises solely under the . . . Sherman Act and the Clayton Act. These first made certain combinations or conspiracies in restraint of trade criminal offences under United States law and then gave civil remedies in the United States federal courts against the offenders. By English conflict of law rules these Acts are purely territorial in their application . . . Prima facie, therefore, in view of the oppressive nature, to English minds, of the United States procedures, it is unconscionable and unjust for a person who is subject to the jurisdiction of the English courts to seek to invoke the United States jurisdiction under the United States Acts against an English company or individual who is not subject to United States jurisdiction.³³

And, after describing the pre-trial procedure in anti-trust cases as a 'farrago of suspicion upon innuendo upon suspicion' he added:

It seems to me all the more important—not least in that what can be the subject of a civil suit under the Clayton Act is criminal under the Sherman Act—to insist on keeping the United States statutory provision of the Sherman and Clayton Acts within the territorial jurisdiction of the United States in accordance with accepted standards of international law.³⁴

Neill LJ's approach was markedly more reserved. He said:

In my view, it is right to treat with great caution the argument that pre-trial discovery is oppressive. The American courts have developed this form of discovery as part of their ordinary procedure and it cannot be right for this court, while paying lip-service to the

³² [1986] 1 QB 689 at pp. 699-700.

³³ At p. 704.

³⁴ At p. 711.

principle of comity, to treat the possibility of exposure to pre-trial discovery as a source per se of injustice. Nor is it right for this court to criticize or appear to criticize the wide-ranging nature of United States anti-trust legislation. We must not overlook the fact that on this side of the Atlantic too there are legal rules designed to stimulate competition and to control restrictive practices: see, for example, article 85 of the EEC Treaty. At the same time, however, it is legitimate to look very closely at the suggestion that a resident in country A who has a series of dealings in country A with another resident of country A and who conducts his dealings in accordance with and subject to the law of country A is at the same time exposing himself to a potential liability in country B because the way in which he conducts the dealings may offend some law in country B . . . [T]he court must look at all the circumstances to see whether the person who is seeking relief has conducted himself in the relevant sphere of his operations in such a way as to bring himself within the scope of the foreign law.³⁵

Probably the difference is one of emphasis rather than substance: the well-established British view of anti-trust jurisdiction³⁶ appears to have the effect of creating a presumption of unconscionability where that jurisdiction is exercised in an excessive way. Here the circumstances—including the lack of any evidence of involvement, or of any ‘conspiracy’ in the sense of English law—reinforced rather than rebutted the case for an injunction.³⁷

Anglo-Irish Agreement of 1985 concerning Northern Ireland—whether derogation from UK sovereignty over Northern Ireland—whether Northern Ireland citizens placed on a different footing from other UK citizens—power of court to restrain executive implementation of treaty

Case No. 4. Ex parte Molyneaux, [1986] 1 WLR 331, Taylor J. Four members of the Ulster Unionist Council sought leave to apply for judicial review of the 1985 Anglo-Irish Agreement for the Establishment of an Intergovernmental Conference concerned with Northern Ireland and its Relations with the Irish Republic.³⁸ They claimed that implementation of the Agreement without Parliamentary authority would be unlawful in three distinct ways.³⁹ First, it would fetter the discretion of the Secretary of State for Northern Ireland in the exercise of his various statutory powers: the Secretary of State would in effect be under the dictation of the Intergovernmental Conference, or would inevitably give undue weight to the views of the Irish Government in relation to Northern

³⁵ At pp. 714-15. Lawton LJ in substance agreed: at p. 700.

³⁶ Cf. *In re Westinghouse Electric Corporation Uranium Contract Litigation*, [1978] AC 547; this *Year Book*, 49 (1978), pp. 282-5.

³⁷ For comment on the decision, see Born, *Virginia Journal of International Law*, 26 (1985), p. 91 at pp. 95-101. Another case in 1986 which is of interest in this context is *South Carolina Insurance Co. v. Aussurantie Maatschappij ‘De Zeven Provinciën’ NV*, [1986] 3 WLR 398 (for a note on the private international law aspects of this case, see p. 434 below). There the question was whether a party to English proceedings should be enjoined from seeking pre-trial discovery under US law against another US resident (not a party to the English proceedings) in relation to documents relevant to the proceedings. The documents could not have been obtained at this stage under English procedures. The House of Lords held, overruling the courts below, that it was not unconscionable to rely on the US pre-trial procedures in the circumstances: see at pp. 410-12 *per* Lord Brandon, whose speech (admittedly outside the context of anti-trust litigation) adopts a much less hostile attitude to US discovery procedures than that expressed or implied in the *Midland Bank* case.

³⁸ *International Legal Materials*, 24 (1985), p. 1582.

³⁹ Taylor J assumed, without deciding, that the applicants had a sufficient interest to give them standing to seek judicial review: [1986] 1 WLR 331 at p. 333.

Ireland issues, views which were in principle irrelevant to Northern Ireland. On this point Taylor J said:

So far as any fetter of discretion is concerned, I have considered the text of the agreement. I have considered also the joint communique which was issued by the two signatories . . . The proposed Intergovernmental Conference will have no legislative or executive power . . . I conclude that its establishment does not contravene any statute, any rule of common law or any constitutional convention. I would go further and say as to the assertion that the agreement would inevitably involve a fetter on the discretion of the Secretary of State, I can find nothing in its text to suggest that that would be so. Indeed, I find quite the contrary. The agreement specifically provides:

'There is no derogation from the sovereignty of either the United Kingdom Government or the Irish Government, and each retains responsibility for the decisions and administration of government within its own jurisdiction.'⁴⁰

Since the Agreement itself did not purport to bind the Secretary of State or the UK Government in respect of particular exercises of statutory powers in Northern Ireland, there was no basis for granting any anticipatory relief, even of a declaratory kind, on this ground.

Secondly, it was claimed that the prerogative power to enter into treaties concerning Northern Ireland was *pro tanto* displaced by the conferral of power on a Northern Ireland executive authority to 'enter into agreements or arrangements with any authority of the Republic of Ireland in respect of any transferred matter', under the Northern Ireland Constitution Act of 1973 section 12 (1) (b). On this point Taylor J gave two replies:

That particular section has been overtaken by events in that in 1974, the Northern Ireland Act was passed which took that authority from the Northern Ireland executive and gave it, as far as legislative matters are concerned, to the Queen in Council and, as far as executive matters are concerned, to the Secretary of State. It does not follow that the absence of any reference to a residual prerogative power in section 12 is to be taken as any indication that there was no residual prerogative power. It seems to me that part of the prerogative power was delegated through section 12 of the Northern Ireland Constitution Act 1973 and it came back under the later Act. The power, therefore, remains within the executive exercising the prerogative to enter into agreements with the Republic of Ireland.⁴⁰

Of the two, the argument that section 12 (1) (b) did not affect the prerogative to enter into treaties is much the more satisfactory one. Even in respect of the overseas dominions the conferral, by constitution or otherwise, of local power to enter into treaties or agreements on certain matters did not affect the treaty-making powers of the Crown. This must be so, *a fortiori*, for a delegated power with respect to part of the UK itself.

The third and most interesting argument related to Article 6 of the Union with Ireland Act 1800, which provides in part:

. . . that in all treaties made by his Majesty, his heirs and successors, with any foreign power, his Majesty's subjects of Ireland shall have the same privileges, and be on the same footing, as his Majesty's subjects of Great Britain . . .

Again, two answers were given, a formal and a substantial one. The formal answer was that Article 6 did not apply to treaties with the Republic of Ireland, since

⁴⁰ At p. 335.

section 2 of the Republic of Ireland Act 1949 provides that the Republic of Ireland is not to be regarded as a foreign country. This statutory hangover of the old *inter se* doctrine could hardly have satisfied the applicants, whose real complaint was precisely that the Republic was being assimilated to a governmental authority over Northern Ireland. But Taylor J rejected the third argument on another ground also. He said:

It does not seem to me, looking at this agreement, that the subjects of Her Majesty in Northern Ireland are to have any other privileges or are to be on any other footing than Her Majesty's subjects of Great Britain. The fact that there is to be consultation on matters which may affect them, according to this agreement with the Government of the Irish Republic; does not, to my mind, deprive them of privileges or place them on a footing other than that of Her Majesty's subjects of Great Britain, who may also be affected by any decisions of policy to be made with regard to Northern Ireland.⁴¹

The reference to 'privileges' in Article 6 of the 1800 Act must be read as a reference to privileges under a treaty; the applicants did not themselves argue that the Agreement conferred any privileges on citizens of the UK or that it discriminated against citizens in Northern Ireland in respect of any such privileges. The more interesting issue related to the second limb of Article 6, the 'equal footing' guarantee. Taylor J's response was merely that other UK citizens could be affected by decisions relating to Northern Ireland. But the 'equal footing' guarantee in Article 6 (like the 'equal protection' guarantee in modern human rights treaties) can hardly be satisfied by a provision which is expressed to apply to a particular part of the UK, if its real effect is to place the inhabitants of that part on an unequal footing, any more than it would be satisfied by the possibility that some other UK citizens could also be affected by a provision which primarily applied to citizens in Northern Ireland. If the equal footing guarantee is a substantial and not merely a formal one, it becomes necessary to examine the substantive effect of the provisions alleged to violate it.

But if 'equal protection' standards are to be applied by analogy, the Agreement, which provides for intergovernmental discussions and advice in relation to serious communal problems basic to the relations between Northern and Southern Ireland, was clearly a reasonable and proportionate response to those problems.⁴² This is particularly so since a substantial margin of appreciation must be allowed to the Crown in such matters. In fact, however, Taylor J evaded, rather than answered, the 'legal footing' argument. This is not surprising: national courts have always been most reluctant to review executive decisions in the field of foreign affairs on the basis of substantive standards, even legislatively enacted ones. As Taylor J said:

The agreement would not establish, as is suggested in the grounds filed by the applicants, 'a new standing body in the United Kingdom.' As its name indicates, the Intergovernmental Conference between the Government of the United Kingdom and that of another sovereign state would be of an international nature. The agreement itself is in the field of international relations. It is akin to a treaty. It concerns relations between the United Kingdom and another sovereign state and it is not the function of this court to inquire into

⁴¹ At p. 334.

⁴² See, e.g., P. G. Polyviou, *The Equal Protection of the Laws* (1980), ch. 2, for a review of equal protection standards and their application.

the exercise of prerogative in entering into such an agreement or by way of anticipation to decide whether the method proposed of implementing the agreement is appropriate.⁴³

This suggests the possibility of a subsequent challenge to particular decisions which conflict with the 'equal footing' guarantee—even if, in the light of the judgment and the Agreement, that possibility is a remote one.

Refugee status—whether matter for judicial or executive decision—Immigration Act 1971 sections 4 (1), 33 (1)—Convention and Protocol relating to the Status of Refugees 1951 and 1967

Case No. 5. R v. Secretary of State for the Home Department, ex parte Bugdaycay, [1986] 1 WLR 155, [1986] 1 All ER 458, CA; pet. all. [1986] 1 WLR 397. Legislatures have been very reluctant to give refugees enforceable rights to challenge decisions to return them to their country of origin, and courts have been as reluctant to assume, even indirectly, powers of review over such decisions.⁴⁴ These three cases, heard together on appeal, provide a further example of both tendencies—in this instance, since the legal issue was a straightforward one, more the former than the latter.

The three applicants had arrived in the UK and been given temporary entry permits after they had made false statements as to their intentions. All three subsequently applied for refugee status, claiming a well-founded fear of persecution if they were returned to their respective countries of origin. Counsel argued that:

(a) the Statement of Changes in Immigration Rules (1983) (HC169) constitute a statement of the practice to be followed; (b) paragraph 16 of the rules (HC169) shows that it would be a breach of the rules to return someone who is a refugee in breach of the Convention; (c) a person who has a fear for his safety in his own country has the status of refugee and has that status before it has been formally determined by any court or other authority . . . ; (d) if the Secretary of State decides to refuse a claim for asylum and seeks to exercise a power to return a person as a non-refugee the status of that person can and should be investigated by a court: cf. *Reg. v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] AC 74; (e) there is nothing in paragraph 73 of the immigration rules (HC169) . . . which ousts the jurisdiction of the court.⁴⁵

The argument was roundly rejected. Neill LJ (with whom Balcombe and Oliver LJ agreed) said:

[Counsel's] argument is based on a misconception of what was decided in the *Khawaja* case. In that case the Secretary of State was claiming jurisdiction to exercise a power under paragraph 9 of Schedule 2 to the Act of 1971 to remove someone as an illegal entrant. The court therefore had a duty to investigate the basis on which the jurisdiction was claimed. In the present case, however, the matter in issue is the right to refuse asylum. By section 4 (1) of the Act of 1971 the power to give or refuse leave to enter the United Kingdom is to be

⁴³ [1986] 1 WLR 331 at pp. 335-6.

⁴⁴ See the survey in G. Goodwin-Gill, *The Refugee in International Law* (1983), ch. 7. The position in Australia is of some interest. The Refugee Convention and Protocol are not part of Australian law, and decisions on refugee status are therefore not directly reviewable: *Simsek v. McPhee* (1982), 40 ALR 61. But decisions on refugee status are made under legislative, not prerogative, power and are therefore decisions made 'under an enactment': accordingly the person affected may require reasons for the decision to be given under the Administrative Decisions (Judicial Review) Act 1977 (Cth.), section 13 (1). See *Minister for Immigration and Ethnic Affairs v. Mayer* (1985), 58 ALR 695.

⁴⁵ [1986] 1 WLR 155 at p. 162.

exercised by immigration officers and the power to give leave to remain or to vary any leave which has been granted is to be exercised by the Secretary of State.

By paragraph 16 of the Immigration Rules (HC169) full account has to be taken by the Secretary of State and immigration officers of the provisions of the Convention. But I can see no basis on which to found any jurisdiction in the High Court to determine the question whether a person is a refugee or should be granted asylum.

There are no statutory definitions or statutory guidelines for the court to interpret or apply. It seems to me to be clear that parliament has decided that all questions of leave to enter should be determined by an immigration officer or by the Secretary of State as the case may be.

The court has no role to play and there is no precedent fact for the court to determine. Furthermore, the investigation of refugee status and the question whether an individual should be afforded asylum might involve the consideration of foreign policy and the assessment of regimes in foreign countries and other similar matters with which a court of law would be ill equipped to deal . . . Without intending any disrespect to the helpful argument of counsel on this point I was not surprised to learn that in other cases a concession has been made that questions as to refugee status and the right to asylum cannot be determined by the High Court.⁴⁶

However, the court did point out that the three cases had been fully considered by the Secretary of State.⁴⁷

Bretton Woods Agreement 1945 Article VIII (2) (b)—‘exchange contract’—need to look at substance of transaction rather than form—onus of proof that exchange control regulations imposed and maintained consistently with Agreement

Case No. 6. Mansouri v. Singh, [1986] 1 WLR 1393, [1986] 2 All ER 619, CA. The plaintiff, who was an Iranian national who had left Iran after the fall of the Shah, sought to get money out of Iran by an arrangement with a travel agent, who purchased airline tickets in Iran with Iranian currency provided by the plaintiff in Iran, in return for which the defendant (the tickets having been sent from Iran) paid the plaintiff their value in sterling in the UK (a value calculated at twice the official rate of exchange). Under the IATA arrangements the airline tickets could be cashed anywhere in the world. The case concerned a dishonoured sterling cheque drawn in England on an English bank by the defendant in favour of the plaintiff, which represented the final leg of the transaction.

The trial judge concluded that the transaction as a whole was an ‘exchange contract’ within the meaning of Article VIII (2) (b) of the Bretton Woods Agreement of 1945 (to which both Iran and the UK are parties),⁴⁸ on the basis that it was a ‘monetary transaction in disguise’.⁴⁹ This decision was not challenged on appeal. The question was rather whether the action on the English cheque was infected by the unenforceability of the underlying transaction. In *United City Merchants (Investments) Ltd. v. Royal Bank of Canada*⁵⁰ the House of Lords held that a confirmed documentary letter of credit was, in part, unenforceable because

⁴⁶ At pp. 162-3.

⁴⁷ The House of Lords has granted leave to appeal from this decision: [1986] 1 WLR 397.

⁴⁸ *United Nations Treaty Series*, vol. 2, p. 39, implemented by the Bretton Woods Agreement Order in Council 1946, SR & O 1946 No. 36, pursuant to the Bretton Woods Agreement Act 1945, section 3 (1).

⁴⁹ *Wilson, Smithett & Cope Ltd. v. Terruzzi*, [1976] QB 683 at p. 714 *per* Lord Denning MR; this *Year Book*, 47 (1974-5), pp. 350-2; *ibid.* 48 (1976-7), pp. 337-9.

⁵⁰ [1983] 1 AC 168; this *Year Book*, 52 (1981), pp. 305-6; *ibid.* 53 (1982), pp. 288-9.

it was issued in respect of a transaction which was in part unenforceable under Article VIII (2) (b). On the other hand, in *Sharif v. Azad*⁵¹ an action on a cheque was allowed to proceed, in apparently similar circumstances.

The Court of Appeal held that for the purposes of applying Article VIII (2) (b), cheques were not to be distinguished from letters of credit: the legal separateness of each from the underlying transaction was displaced by the strong rule of public policy incorporated in Article VIII (2) (b), which required the court to look at the substance of the transaction rather than its form. *Sharif v. Azad* was distinguished on the basis that the cheque in that case, being drawn between English residents in England, did not contravene the exchange control regulations of Pakistan. Neill LJ (with whom Slade and May LJJs agreed) said:

I can find no satisfactory basis for distinguishing the present case from the decision in the *United City Merchants'* case. Clearly, there are strong and compelling reasons for treating the rights and obligations which arise from commercial documents such as bills of exchange, letters of credit and performance bonds as being autonomous and as having an existence of their own which is unaffected as far as possible by the rights and obligations which spring from associated transactions. These reasons may be particularly obvious in the case of a cheque or bill of exchange which contains no reference on its face to any underlying or associated transaction and which has the characteristic of being negotiable. But it is to be remembered that, where section 2 (b) applies, the court, by virtue of an international agreement, has an obligation not to enforce the exchange contract. Accordingly, once a section 2 (b) point arises, either because the point is raised by one of the parties or because the point is perceived by the court itself, the court has two tasks to perform: (a) to identify any monetary transaction, whether concealed or not, which constitutes a relevant exchange contract; and (b) to refuse to enforce the monetary transaction or any linked transaction or contract which if enforced would give effect to the monetary transaction. If this be the right approach, it seems to me to follow that in the instant case, where the parties to the English cheque were the same parties as the parties to the exchange contract and where it was intended and contemplated that the cheque would be issued by the defendant to give effect to and to carry out his obligations under the exchange contract, the court is obliged to refuse to enforce payment of the cheque. Indeed, it might be said that to enforce payment of this cheque in the circumstances of the instant case would be to do violence to the principles underlying the Bretton Woods Agreement . . . I have not reached this conclusion without misgivings because so much importance is rightly attached to the autonomous nature of a negotiable instrument. Furthermore, I would wish to keep open, for consideration in some future case, the question whether an obligation to make payment to an innocent third party to whom a cheque had been negotiated could be regarded as an obligation which, if performed, would give effect to the exchange contract.⁵²

As was pointed out in an earlier volume of this *Year Book*,⁵³ the adoption of a relatively narrow interpretation of 'exchange contract' in Article VIII (2) (b) requires the courts to be astute to discern the economic reality behind the legal form of a transaction. This link, though not articulated in this case, perhaps explains the Court's desire to distinguish *Sharif v. Azad* (where the Court of Appeal, *obiter*, took a broad view of 'exchange contract'). The combination of a narrow interpretation of 'exchange contract' and insistence on the formal separateness of the contract embodied in the cheque from the underlying transaction would have left Article VIII (2) (b) open to evasion.

⁵¹ [1967] 1 QB 605.

⁵² [1986] 1 WLR 1393 at pp. 1403-4.

⁵³ This *Year Book*, 52 (1981), p. 305.

However, the Court went on to hold that no satisfactory evidence had been produced as to whether the Iranian foreign exchange control regulations were 'maintained or enforced consistently with' the Bretton Woods Agreement. This was not a matter to be decided by speculation or assumption on the part of the trial judge, and the case was accordingly remitted for further hearing on this point.⁵⁴

Immunity of diplomatic premises—diplomatic relations terminated—whether immunity subsists—Vienna Convention on Diplomatic Relations 1961 Article 22—State immunity—service of process on foreign State—whether possible if diplomatic relations terminated—whether claim can proceed ex parte—State Immunity Act 1978 section 12 (1)

Case No. 7. Westminster City Council v. Government of the Islamic Republic of Iran, [1986] 1 WLR 979, [1986] 3 All ER 284 (Peter Gibson J). One consequence of the restrictive theory of immunity is to place increasing pressure on procedural issues arising in the course of suing foreign States. Among these procedural issues undoubtedly the most important, because of its consequences for the court's jurisdiction, is service of process. In the present case the procedural issue of service of process was much more important and difficult than the substantial issue of immunity.

The case concerned the Iranian embassy building which was stormed by the Special Air Service in May 1980 in order to release hostages held there, and which was burnt out in the process. Diplomatic relations between Iran and the UK were terminated. The embassy building was left in a dangerous condition after the fire, and acting under its statutory powers, the Westminster City Council took steps to shore up and secure the building. Its expenses in doing so, if not paid by the owner of the building, could be registered as charges against the land under the Local Land Charges Act 1975 section 1 (1) (a), but these charges could not be realized unless they were also registered under the Land Registration Act 1925. In seeking registration the Council said it had no intention to bring about a sale of property to satisfy the land charges: rather it was concerned to secure its claim against the possibility that the premises would be sold.⁵⁵ The question was, however, whether the charges could be registered under the 1925 Act other than by legal proceedings to which the Iranian Government was a party; if not, could service be effected on the Iranian Government, and were the premises still immune under the Vienna Convention on Diplomatic Relations of 1961, Article 22?

The first of these three questions was the most difficult, and the most interesting. The Council had sought to register the charges through the Land Registry, that is to say, by administrative means. The Registry invited the Iranian Government to comment on the Council's application, and the Government objected to registration, through London solicitors, on the grounds of diplomatic and State immunity. The Chief Land Registrar then ordered the Council to bring the matter before the court for resolution: this was done by way of an originating summons naming the Iranian Government as defendant. However, the Government's solicitors maintained that, though instructed to object to registration of the charge, they had no instructions to accept service on behalf of Iran. The Council

⁵⁴ [1986] 1 WLR 1393 at p. 1404.

⁵⁵ Indeed, for the reason stated in n. 61, the Council could not have sold the building while it was owned by the Iranian Government and was not in use for commercial purposes.

thus had to demonstrate that the proceedings were, notwithstanding their form, essentially *ex parte* or administrative proceedings, to which Iran was not a necessary party.

Section 12 (1) of the State Immunity Act 1978 refers to 'any writ or other document required to be served for instituting proceedings against' the State. It was argued that the 'proceedings' before the Land Registrar were administrative in character, and that the requirement of notice to an objector under the Land Registration Rules 1925 did not alter this situation. By extension the proceedings before the court were also *ex parte*: jurisdiction depended not on service but on the existence of a claim to register a charge on local land. Peter Gibson J said:

[Counsel] submitted that despite the mandatory nature of section 12 (1) it had no application because the originating summons was not a document required to be served for instituting proceedings against a state, but was merely a document chosen as a convenient method of bringing the matter before the court in compliance with the Chief Land Registrar's order. I regret that I cannot accept this. Whatever originating process was chosen, it must have been envisaged that the city council would be instituting proceedings as plaintiff and the only other known interested party, the Iranian government, would be defendant, and that by analogy with rule 300 of the Land Registration Rules 1925 the Iranian government would be served with the proceedings, so that it could participate in the hearing before the court. It seems to me, therefore, that the wording of the opening words of section 12 (1) of the State Immunity Act 1978 is satisfied in the present case.

There are some *ex parte* originating proceedings provided for under the Rules of the Supreme Court, for example, an *ex parte* originating summons. If such an *ex parte* application were an appropriate originating process, the fact that another form of originating summons had been used would not have deterred me from exercising the power in R.S.C., Ord. 2 and from treating the application as one made by the appropriate mode; but I find it impossible to say that on a dispute arising under the Land Registration Act 1925 it would be appropriate for an *ex parte* originating process to be used. It is known that there is a dispute between the city council as applicant for registration and the Iranian government as objector. It seems to me, therefore, to be contrary to principle in those circumstances to treat the matter as though it were an *ex parte* originating process.⁵⁶

Assuming that service was required in proceedings to register the Council's charge, the second issue was whether service could be effected despite the rupture of diplomatic relations between Iran and the UK. Section 12 (1) of the State Immunity Act 1978 is in mandatory terms: unless the foreign State has agreed under section 12 (6) to some other method of service, the writ or other document 'shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs' of the State. On the other hand section 12 does not, in terms at least, impose any obligation on the Foreign and Commonwealth Office to effect service, and in this case the Swedish Embassy, which was looking after British interests in Iran as a 'third State' under Article 45 (c) of the Vienna Convention, was, as Peter Gibson J put it, 'perhaps understandably not prepared to effect such service'.⁵⁷ The plaintiff relied on a provision in the Supreme Court Rules (RSC, Ord. 32, r. 5), allowing the court to proceed in the absence of a party 'if it thinks it expedient to do so'. But this, it was held, was concerned only with proof of service, and did not confer power to dispense with service altogether: moreover, the general dispensing power in the Rules (RSC, Order 2, rule 1) could not be used to dispense with the essential requirement of

⁵⁶ [1986] 1 WLR 979 at pp. 982-3.

⁵⁷ At p. 980.

service in what was properly a proceeding *inter partes*.⁵⁸ Thus Peter Gibson J held that he could not

. . . rule on the question referred to the court without prior service on the Iranian government. I reach this conclusion with no satisfaction whatsoever. I find it disquieting that the Iranian government, having raised an objection, can frustrate the resolution by the court of the question thereby raised by not being willing to accept service through the solicitors who raised the objection on their behalf. But . . . by taking a state immunity objection the Iranian government has not submitted in any way to the jurisdiction (see section 2 of the State Immunity Act 1978), and further I recognise that the particular problem in the present case arises only because of the exceptional circumstance that the method of service provided for by section 12 of the Act of 1978 is or may be for the time being impractical.⁵⁹

The third, substantive, issue in the case was, as suggested already, the easiest. Article 22 (1) provides that the premises of a diplomatic mission are 'inviolable'. Article 22 (3) provides that such premises are 'immune from search, requisition, attachment or execution'. Article 1 (i) defines 'the premises of the mission' as 'the buildings . . . and the land ancillary thereto . . . used for the purposes of the mission'. Peter Gibson J had no difficulty in finding that the premises here were no longer 'used' for the purposes of the mission. He said:

The key word [in Article 22 (1)] is 'used'. That must connote the present tense 'which are used'. The fact that premises have been used in the past cannot be relevant to the state immunity afforded by the Vienna Convention 1961. The evidence is clear that since May 1980 the premises have not been used. The premises are in such a state now that they could not be used without extensive rebuilding. The Foreign and Commonwealth Office, in a letter dated 2 November 1984, expressed to the city council the view that the building no longer constituted the premises of the Iran mission within the meaning of article 1 (i). I agree. It seems to me clear beyond argument that the premises have ceased to be used for the purposes of the mission, and in those circumstances the provisions of article 22 have no application to the premises.⁶⁰

Although Peter Gibson J did not say so, it is clear that the recovery of the Council's costs by way of the enforcement of a charge on the land concerned would also not give rise to immunity under the State Immunity Act 1978. Under section 6 (1) (b) of that Act a State is not immune in proceedings to enforce any obligation of the State arising out of its interest in, or its possession or use of, immovable property in the UK, and there is no requirement that the property be in use for commercial purposes, or that the obligation in question should arise from a commercial transaction.⁶¹

⁵⁸ Cf. at p. 983.

⁵⁹ At p. 984.

⁶⁰ At pp. 984-5.

⁶¹ The enforcement of a judgment in respect of any such obligations—even where, as in this case, it is in the nature of a judgment *in rem* against the property concerned—is another matter. Under the 1978 Act such a judgment can only be enforced (in the absence of waiver) against property 'which is for the time being in use or intended for use for commercial purposes' (section 13 (4)). This contrasts with the position under the equivalent Australian legislation, the Foreign States Immunities Act 1985 (Cth.), section 33 of which allows execution against immovable property in respect of which a right has been established as against a foreign State under section 14, the equivalent to section 6 of the UK Act. (Of course under the Australian Act any specific immunity of diplomatic property under the 1961 Vienna Convention is expressly saved (section 6), but there was no such immunity here.) The Canadian legislation takes a similar position: State Immunity Act 1982 (Can.), section 11 (1) (c). For discussion, see Australian Law Reform Commission Report No. 24, *Foreign State Immunity* (1984), para. 134.

Despite the lack of substantive immunity the plaintiff thus failed on procedural grounds. This is an unsatisfactory situation, at least in a case concerning derelict land within the jurisdiction. It is interesting to speculate whether the plaintiff would have been more successful if it had sought an order for mandamus or a declaration against the land registrar on the ground that the registrar was required to register the charge. Another alternative—at the level of law reform—would be to provide for a land charge to arise in such circumstances by operation of law, with no discretion in the land registrar to refuse to register, but with a right in the landowner or other interested person to apply to a court to annul or vary the charge.⁶² What is clear is that very careful thought will have to be given to the procedure to be adopted in dealing with administrative liabilities of foreign States, given the substantial premium that still attaches to a foreign State which is procedurally the defendant in any resulting litigation.

Evidence (Proceedings in Other Jurisdictions) Act 1975—request for evidence in proceedings to challenge a foreign tax assessment—whether proceedings in a ‘civil or commercial matter’—relation between statute and international convention

Case No. 8. In re State of Norway's Application, [1986] 3 WLR 452, [1986] 1 Lloyd's Rep. 496, CA. This unusual case involved the question whether proceedings brought by a taxpayer in his home country to challenge an assessment to taxation in that country were proceedings in a ‘civil or commercial matter’ within section 9 (1) of the Evidence (Proceedings in Other Jurisdictions) Act 1975, which implements the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970.⁶³ Both the taxpayer and the State of Norway, a defendant in the Norwegian proceedings, sought an order under the 1975 Act to obtain the evidence of two English bankers who had been involved in the relevant transactions. Administrative proceedings were also pending before a Norwegian taxation tribunal which was not a ‘court or tribunal’ for the purposes of the 1975 Act. The case involved a considerable number of issues of the interpretation and application of the Act: for present purposes the principal point of interest is the meaning of the phrase ‘civil or commercial matter’ in the Act and Convention. The Court held (Kerr LJ *dubitante*) that the proceedings were—or at least, had not been shown not to be—‘civil or commercial’. Glidewell LJ (with whom Ralph Gibson LJ agreed) merely held that there was sufficient evidence that they were regarded as ‘civil or commercial’ under Norwegian law.⁶⁴ But this assumed that the Convention left the matter to be determined according to the law of the requesting State, and that assumption was by no means inevitable. The crux of this aspect of the case, therefore, was Kerr LJ's reasons for

⁶² On the other hand, it would probably be a breach of the inviolability of diplomatic premises under the 1961 Convention for the law to provide for a statutory lien or charge to arise over the premises in particular circumstances, even if the lien or charge was unenforceable *in personam*, and even if the lien or charge arose with respect to a fee for service not within the scope of the fiscal immunity guaranteed by Article 23 (1) of the Vienna Convention: cf. *Republic of Argentina v. City of New York*, 303 NYS (2d) 644 (NYCA, 1969). The scope of substantive State immunity (as distinct from procedural immunity from suit) outside the context of diplomatic and consular immunity is less clear, but probably much less extensive.

⁶³ Cmnd. 6727; *United Kingdom Treaty Series*, No. 20 (1977).

⁶⁴ [1986] 3 WLR 452 at pp. 489-90. Ralph Gibson J agreed: at p. 492.

rejecting a single 'international' interpretation of the words. After finding no illumination in the language or *travaux* of the Convention,⁶⁵ he said:

It appears incontestable that no civil law country would ever treat a disputed tax claim as part of 'matière civile ou commerciale.' Droit fiscal is not comprised in 'droits et obligations de caractère civil': see the decision of the Belgian Cour de Cassation in *Salvatore v. Etat Belge Ministère des Finances*, 8 April 1976 (J.T., 26 June 1976, p. 444) . . . For the purposes of the European Judgments Convention of 1968 it is settled law that the expression 'matière civile ou commerciale' does not include disputes 'between a public authority and a person governed by private law . . . if the public authority is acting in the exercise of its public authority powers': see *State of the Netherlands v. Ruffer* (case 814/79) [1981] 3 C.M.L.R. 293, 313 . . . For the purposes of that Convention, even in its original form . . . any dispute concerning liability for taxes could clearly not be a 'civil or commercial matter' . . . But: (a) the subject matter of the European Judgments Convention 1968 is the recognition and enforcement of foreign judgments; not merely judicial assistance for the provision of evidence in foreign courts. (b) The European Court is empowered by the Treaty of Rome to interpret the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, authoritatively. It does so in a sense which is 'communautaire' within the members of the European Economic Community. There is nothing analogous for the Convention of 1970 or any other Hague Convention, which are open to accession by any country: see, for example, article 39 of the Convention of 1970. The preamble refers to the desirability 'to improve *mutual* judicial co-operation in civil or commercial matters' (my italics) which may point away from a multilateral or generally international interpretation. . . . In the Act of 1975, the Convention of 1970 is not mentioned at all. The Act clearly applies to requests for evidential assistance issued by or on behalf of a court or tribunal in any foreign country, whether or not it has adhered to the Convention of 1970. Since the words 'civil or commercial matter' are wholly unqualified, a wide interpretation was presumably intended, though in my view one which was clearly designed to exclude 'public law' disputes.⁶⁵

And he concluded that:

If the *substance* of a dispute is clearly a matter of *public* law in the jurisprudence of the requesting court, then I would not accept that it can properly be regarded as 'matière civile ou commerciale' for the purposes of the Hague Convention or any legislation based upon it. But although I regard the evidence on Norwegian law as insufficiently searching, particularly on the characterisation of the substance of these proceedings by reference to the distinction between public and private law which may well be recognised in Norway as in civil law countries, I do not feel able to conclude on the evidence that the . . . action cannot be regarded as a proceeding in a civil matter by the law of Norway.⁶⁶

⁶⁵ At pp. 475, 477. Kerr LJ's judgment contains a comprehensive review of the authorities.

⁶⁶ Ibid. at p. 478. As usual, a number of other cases in 1986 involved the interpretation of international treaties. These included *In re Fatima*, [1986] 1 AC 527, where the House of Lords again had to grapple with the recognition of a 'talaq' divorce as a 'proceeding' under the Divorce and Legal Separations Act 1971 as amended, implementing the Hague Convention on the Recognition of Divorces and Legal Separations 1970: cf. *Quazi v. Quazi*, [1980] AC 744; this *Year Book*, 50 (1979), pp. 227-32. It held that the pronouncement of talaq was a necessary part of proceedings to effect a divorce under the law of Pakistan, and that since talaq had been pronounced in England the proceedings had not been instituted 'in the country in which [the divorce] was obtained', within section 3 (1) of the 1971 Act. The House declined to give effect to the alleged mischief of the Hague Convention in this case, since Parliament had, in the Domicile and Matrimonial Proceedings Act 1973 section 16 (1), expressly provided that proceedings in the UK were not to be 'regarded as validly dissolving a marriage unless instituted in the courts of law': at p. 534 *per* Lord Ackner. (For a note on the private international law aspects of this case, see p. 445 below.) In *Swiss Bank Corporation v. Brink's M.A.T. Ltd.*, [1986] 1 QB 853, the question was whether an award of interest on unpaid

damages could be made outside the limits of liability established by the Carriage by Air Act 1961, implementing the Warsaw Convention as amended at The Hague in 1955. Article 22 (2) (a) of the Convention limits 'the liability of the carrier' to a specified amount. Article 22 (4) allows an additional award of 'court costs and other expenses of the litigation incurred by the plaintiff'. Bingham J reached the unpalatable conclusion that the amount of interest was included in the liability limited by Article 22 (2) (a), by way of an *expressio unius* argument from Article 22 (4). He did so after a (not very rewarding) review of the international case law and doctrine, and after finding that the *travaux préparatoires* were unhelpful on the point: at pp. 859-61. See also *Arctic Electronics Co. (UK) Ltd. v. McGregor Sea and Air Services Ltd.*, [1985] 2 Lloyd's Rep. 510 (relationship between jurisdictional provisions in a treaty (the CMR Convention of 1965) and wider jurisdictional bases in RSC Ord. 11). A number of cases in 1986 concerned extradition treaties. *In re Rees*, [1986] 1 AC 937, concerned a charge of hostage-taking in a State other than the requesting State. The House of Lords held that the phrase 'depositions or statements on oath, taken in a foreign state' in section 14 of the Extradition Act 1870 extended to depositions taken in the third State, notwithstanding that Article XI of the extradition treaty with Germany (applied by the Federal Republic of Germany (Extradition) Order 1960 as amended) appeared to contemplate only evidence taken in the requesting State. The case is of some significance in the context of extradition for acts of terrorism committed abroad, and indeed any cases based on the passive personality principle. It also demonstrates, yet again, the need for revision of the 1870 Act. See also *R v. Governor of Pentonville Prison, ex parte Voets*, [1986] 1 WLR 470 (held: photographs were admissible to prove identity in extradition proceedings even though they would have been excluded at an English trial in the exercise of the discretion to exclude).

B. PRIVATE INTERNATIONAL LAW*

Service of process out of the jurisdiction: forum non conveniens

Case No. 1. Order 11, rule 1 (1), of the English Rules of the Supreme Court sets out the principal cases in which service of a writ out of the jurisdiction is permissible. Rule 4 (2) of the Order provides: 'No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.' For a court, otherwise jurisdictionally incompetent, to take jurisdiction over an absent defendant, what is acknowledged to be a discretionary hurdle must, therefore, be surmounted. In a different type of situation, namely that in which a court is jurisdictionally competent (usually because the defendant has been personally served), it may nevertheless exercise an inherent power to stay the proceedings notwithstanding that competence. Whereas the nature and extent of the discretion in the former situation had become fairly stabilized over a long period of time, the nature and extent of the latter power has been the subject of major revision which was first foreshadowed as recently as some fourteen years ago in the decision of the House of Lords in *The Atlantic Star*.¹ The direction subsequently taken by this revision has been such as to provoke comparison between exercise of this power to stay and the discretion involved in granting leave to serve an absent defendant pursuant to Order 11. In a recent House of Lords case, *Spiliada Maritime Corporation v. Cansulex Ltd.*,² Lord Goff of Chieveley has taken the opportunity 'in particular to give further consideration to the relationship between cases where jurisdiction has been founded as of right by service of proceedings on the defendant within the jurisdiction, but the defendant seeks a stay of the proceedings on the ground of forum non conveniens, and cases where the court is invited to exercise its discretion, under RSC, Order 11, to give leave for service on the defendant out of the jurisdiction'.³

The issue before their Lordships' House in *Spiliada Maritime Corporation v. Cansulex Ltd.* was simply as to whether the case had been shown to be 'a proper one for service out of the jurisdiction'. Any question as to the staying of English proceedings did not, and on the facts could not, arise. Indeed, viewed narrowly what was most particularly decided was that, in considering whether leave should be given for service under RSC, Order 11, rule 4 (2), it is proper for the judge to take into account the fact that an analogous action is already being heard in England. It would, however, savour of pedantry to dismiss as *obiter dicta* Lord Goff's extensive review of the present general law relating to, not only service *ex juris*, but also the exercise of the power to stay. Moreover, such an assessment of the significance of *Spiliada Maritime Corporation v. Cansulex Ltd.* as an authority could be seen as being misconceived rather than merely pedantic. It would clearly be misconceived if what has been established by their Lordships is that the factors controlling or influencing the exercise of the discretion or power are likely to be the same, or virtually the same, in both situations. It could, of course, appear incongruous if the application of in effect the same test in both situations were to imply that a court should be no more reluctant to deny its availability to a plaintiff,

* © P. B. Carter, 1987.

¹ [1974] AC 436.

² [1986] 3 WLR 972.

³ Ibid. 983.

who has taken the required steps to found its jurisdiction, than it is to allow a plaintiff, who has not taken such steps, to take advantage of a rule which permits assumption of a jurisdiction which is extraterritorial (and in some cases could be exorbitant), and which is a jurisdiction which the common law traditionally refuses to concede to foreign courts. However, this apparent incongruity becomes less marked if what is implied is not that the test is the same in both situations, but that the factors to be taken into account in applying slightly different tests tend to coincide. Moreover, and more importantly, the legal burden of proof may be differently placed in the two types of case.

The simplified facts of *Spiliada Maritime Corporation v. Cansulex Ltd.* were these. In 1980 a Liberian owned vessel was chartered to carry a cargo of bulk sulphur from Vancouver, British Columbia, to Indian ports. The shipowners alleged that the cargo was wet when loaded and as a result caused severe corrosion to the vessel. They obtained leave *ex parte* to serve proceedings on the shippers in Vancouver or elsewhere in Canada on the ground that it was an action to recover damages for breach of a contract governed by English law. The shippers issued a summons alleging that the case had not been shown to be 'a proper one for service out of the jurisdiction' under RSC, Order 11, rule 4 (2). At the hearing Staughton J, who had already started to hear the trial of a similar action for damages involving the same shippers in respect of another ship, the *Cambridgeshire*, considered, *inter alia*, the availability of witnesses, potential multiplicity of proceedings and the fact that the accumulated experience of counsel and solicitors derived from their participation in the *Cambridgeshire* action would lead to savings of time and money. He dismissed the application. The Court of Appeal allowed the shippers' appeal and set aside the writ. This decision was itself reversed by the House of Lords, the order of Staughton J being restored. The leading judgment is that of Lord Goff of Chieveley, with whom Lords Keith of Kinkel, Templeman, Griffiths and Mackay of Clashfern agreed. Lord Templeman expanded his concurrence in words which clearly differentiate the position relating to the incidence of the legal burden of proof (or 'risk of non-persuasion') in the two classes of case referred to above. His Lordship said:

Where the plaintiff is entitled to commence his action in this country, the court, applying the doctrine of *forum non conveniens* will only stay the action if the *defendant* satisfies the court that some other forum is more appropriate. Where the plaintiff can only commence his action with leave, the court, applying the doctrine of *forum conveniens* will only grant leave if the *plaintiff* satisfies the court that England is the most appropriate forum to try the action. But whatever reasons may be advanced in favour of a foreign forum, the *plaintiff* will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere.⁴

A different point, also singled out by Lord Templeman in his short judgment, is perhaps more controversial. Having admitted that the 'factors which the court is entitled to take into account in considering whether one forum is more appropriate are legion'⁵ and that the 'authorities do not, perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case',⁶ concluded 'that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. . . . An appeal should be rare and the appellate court should be slow to interfere'.⁷ That as

⁴ [1986] 3 WLR 972, 975. Italics supplied.

⁵ Ibid. 975.

⁶ Ibid. 975.

⁷ Ibid. 975.

a general rule the exercise of a discretion is essentially a matter for the trial judge, and that consequently an appellate court should be reluctant to disturb that exercise, is incontrovertible. Indeed, the proposition highlights the difference between a discretion and a flexible rule of law. However, even assuming (as one probably now should assume) that in both of the contexts under consideration what is involved is the exercise of a discretion rather than the exercise of a legal power, legitimate doubts could be entertained as to whether the present juncture is an opportune one for total disengagement on the part of the appellate courts in this particular area of the law. It is an area in which the wind of change has recently (albeit belatedly) been blowing with considerable force, and the full force of that wind may well not yet be spent. Abrupt curtailment of access to appellate courts could constitute an artificial wind-break having the effect of arresting its flow, or perhaps deflecting that flow into diverse and unco-ordinated directions. It is important that developments anticipated in 1974 in *The Atlantic Star*⁸ and initiated four years later in *MacShannon v. Rockware Glass Ltd.*⁹ relating to the staying of actions, and now affecting service of process *ex juris*, should be allowed to run their course in a continuing and uniform way. Lord Templeman sought to avoid the risk of this being prejudiced by expressing the hope 'that in future the [trial] judge will be allowed to study the evidence and refresh his memory' of Lord Goff's speech in the present case 'in the quiet of his room'.¹⁰ Lord Goff himself, however, seems to have seen his own speech differently and as forming part of a continuum. His Lordship said: 'But, in any event, the law on this subject is still in a state of development; and it is perhaps opportune to review the position at this stage. . . .'¹¹ To accept this is, of course, not to deny the speech landmark status.

Recalling that Lord Diplock in *The Abidin Daver*¹² had embraced the use of the term *forum non conveniens* in the context of an application for a stay, Lord Goff re-emphasized the linguistic shortcomings of this Latin 'tag'. His Lordship cited with approval expository Scots authority including the words of Lord Kinnear in *Sim v. Robinow*¹³ that 'the plea [*forum non conveniens*] can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and the ends of justice'.¹⁴ As Lord Goff himself said: ' . . . the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction . . . it is most important not to allow [the tag] to mislead us into thinking that the question at issue is one of "mere practical convenience"'.¹⁵

His Lordship then proceeded to summarize in the light of the authorities, and in particular the Scottish authorities, the present position in relation to the granting of a stay. He said:

The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.¹⁶

⁸ [1974] AC 436.

⁹ [1978] AC 795.

¹⁰ [1986] 3 WLR 972, 975.

¹¹ Ibid. 983.

¹² [1984] AC 398.

¹³ (1892) 19 R 665.

¹⁴ Ibid. 668.

¹⁵ [1986] 3 WLR 972, 984.

¹⁶ Ibid. 985.

He reaffirmed that the general burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. In this context Lord Goff said: 'In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum, but to establish that there is another forum which is clearly or distinctly more appropriate than the English forum'.¹⁷ He mentioned that: 'It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence.' This is, of course, unexceptionable. However, his Lordship then added: 'Furthermore, if the court is satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below)'.¹⁸ In '(f) below', Lord Goff, having reiterated in the previous paragraph that, if the court concludes that there is no other available *forum* which is clearly more appropriate for the trial of the action, it will usually refuse a stay, said: 'If however the court concludes at that stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.'¹⁹ Given the diversity of meanings that have been (and still are) apparently intended by the use of the phrase '*prima facie*', a judge often uses the phrase at his peril. The phrase is not infrequently used to indicate no more than that a contrary finding would not be set aside as unreasonable, or to denote sufficient evidence to justify leaving an issue to a jury. Presumably Lord Goff intended something different and stronger—namely that only when the court has been affirmatively persuaded of the existence of another more appropriate forum (i.e. only when the legal burden resting on the plaintiff in respect of that issue has been discharged) will a stay usually be granted—that is, unless the plaintiff is able to discharge the legal burden then resting on him but in respect of a different issue, namely the existence of special circumstances.

An important aspect of Lord Goff's speech lies in his rejection of the lingering notion that the discharge of that last-mentioned burden by the plaintiff precludes the granting of a stay. Lord Diplock had said in *MacShannon v. Rockware Glass Ltd.*²⁰ that 'In order to justify a stay two conditions must be satisfied . . . (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court'. Referring to proof of 'a legitimate personal or juridical advantage', Lord Goff said: 'Clearly, the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive.'²¹ His Lordship instanced, as typical advantages which a plaintiff might enjoy by invoking the English jurisdiction, the award of damages on a higher scale, a more complete procedure for discovery, a power to award interest and a more generous limitation period,²² but concluded:

¹⁷ [1986] 3 WLR 972, 986.

¹⁸ *Ibid.* 985-6.

¹⁹ *Ibid.* 987.

²⁰ [1978] AC 795, 812.

²¹ [1986] 3 WLR 972, 991.

²² Part of Lord Goff's consideration of matters of limitation and time-bars is not altogether easy to follow, as it appears not to take full account of the provisions of the Foreign Limitation Periods Act 1984.

'Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum.'²³ The position would seem to be that, when the defendant has demonstrated the availability of another competent and more appropriate *forum*, but the plaintiff has established that a stay of the English proceedings would deprive him of such an advantage, the court must have resort to what Lord Goff referred to as 'the underlying fundamental principle'.²⁴ His Lordship reiterated that 'We have to consider where the case may be tried "suitably for the interests of all the parties and for the ends of justice"'.²⁵ It is at this stage that Lord Wilberforce's positing of a 'critical equation'²⁶ would seem to be apt. The force of the respective burdens of proof resting on the parties is spent. The court has to strike a balance between largely unbalanceable considerations. It is the sort of task that is often unavoidable in the administration of justice.

In *Amin Rasheed Shipping Corporation v. Kuwait Insurance Corporation*²⁷ Lord Wilberforce has said, with reference to the requirement that for leave to be granted under Order 11 it must be made 'sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction',²⁸ that: 'The rule does not state the considerations by which the court is to decide whether the case is a proper one, and I do not think that we can get much assistance from cases where it is sought to stay an action started in this country, or to enjoin the bringing of proceedings abroad.'²⁹ Of this Lord Goff said:

... while sharing Lord Wilberforce's concern about help to be derived, in Order 11 cases, from cases where an injunction is sought to restrain proceedings abroad, I respectfully doubt whether similar concern should be expressed about help to be derived from cases of *forum non conveniens*. It seems to me inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinneir in *Sim v. Robinow* 19 R 665, 668, viz. to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice.³⁰

Having emphasized this *general* similarity, Lord Goff went on to identify only three *specific* distinctions between the two types of case. These distinctions are interrelated. The first concerns the incidence of the burden of proof. The second, from which the first is largely derived, is that in Order 11 cases the plaintiff is seeking to persuade the court to exercise a power which may be exercised—but a power the exercise of which the court is mandated *not* to exercise unless it is persuaded that the case is 'a proper one for service out of the jurisdiction'. The third distinction concerns the castigation of jurisdiction exercised by virtue of Order 11 as being sometimes 'exorbitant'.³¹ Lord Goff expressed some reservation about the use of the word in the present context, it being 'an old-fashioned word which perhaps carries unfortunate overtones'.³² The use of the word should properly denote no more than that the burden which rests on the plaintiff is not merely to persuade the court that England is the appropriate *forum*, but to show

²³ Ibid. 991.

²⁴ Ibid. 991.

²⁵ Ibid. 991.

²⁶ *The Atlantic Star*, [1974] AC 436, 468.

²⁷ [1984] AC 50.

²⁸ RSC, Ord. 11, r. 4 (2).

²⁹ [1984] AC 50, 70.

³⁰ [1986] 3 WLR 972, 989-90.

³¹ See, e.g., Lord Diplock in *Amin Rasheed Shipping Corporation v. Kuwait Insurance Corporation*, [1984] AC 50 at p. 65.

³² [1986] 3 WLR 972, 990.

that this is clearly so. All relevant circumstances are to be taken into account.³³ His Lordship's point here seems to be simply that the use of pejorative terminology is not helpful. It would appear, however, that there is in fact a fourth *specific* distinction. Whereas in an application for a stay the defendant has to identify a *more* appropriate *forum*, in an application for leave under Order 11 the plaintiff must show that England is the *most* appropriate *forum*.

Jurisdiction to restrain foreign proceedings: general principles and a special case

Case No. 2. Lord Brandon of Oakbrook began his speech in the House of Lords in *South Carolina Insurance Co. v. Assurantie Maatschappij 'De Zeven Provinciën' NV*³⁴ thus:

My Lords, the question for decision in this appeal is a novel one and can be stated in this way. An action between A and B is pending before an English court. While it is pending B, exercising a statutory right potentially available to him under the federal law of the United States, applies to a district court of the United States for an order that persons resident in the United States, who are not parties to the action before the English court, should give him pre-trial discovery of documents relevant to the issue in that action. In those circumstances, is it right for the English court, on the application of A, to grant an injunction against B prohibiting him from prosecuting further his proceedings in the United States district court? Hobhouse J at first instance, and the Court of Appeal . . . have held that it is right for such an injunction to be granted.³⁵

The House of Lords allowed the enjoined parties' further appeal.

The plaintiff, a US insurance company ('South Carolina'), had accepted reinsurance of risks which had previously been accepted by another US insurance company ('United National'). South Carolina had in its turn re-reinsured these risks, with a number of other insurance companies in the London market. These other insurance companies included a Dutch company, Assurantie Maatschappij 'De Zeven Provinciën' ('Seven Provinces') and two Middle or Far Eastern companies ('Al Ahlia') and ('Arabian Seas'). In or about 1984 South Carolina called on these three companies to pay substantial sums, which South Carolina claimed to be due from them under the contracts of re-reinsurance. Seven Provinces, Al Ahlia and Arabian Seas refused to make the payments. As a result South Carolina brought two actions in England to recover the sums claimed. Before the defence was served, the defendants lodged a petition in a US District Court seeking, *inter alia*, an order for pre-trial discovery of documents, relevant to the claim and to the plaintiff's contract with United National, against persons resident in the US, who were not parties to the English action. On the plaintiff's application the English judge (Hobhouse J) made an order restraining the defendants from taking any further steps in the US proceedings (or enforcing any order made therein). It was the defendants' appeal from this that was dismissed by the Court of Appeal; but their further appeal to the House of Lords was allowed. The leading speech was that of Lord Brandon. He drew attention to the fact that 'if the re-reinsurers are to achieve their legitimate object of inspecting and

³³ Lord Goff also pointed out (at pp. 990-1) that 'the circumstances specified in Ord. 11, r. 1 (1), as those in which the court may exercise its discretion to grant leave to serve proceedings on the defendant outside the jurisdiction, are of great variety', and that the particular ground invoked by the plaintiff may sometimes have a bearing upon the exercise of the discretion to grant leave.

³⁴ [1987] AC 24.

³⁵ *Ibid.* 31.

copying where necessary, relevant documents held by P.G.A. [underwriting agents for United National] and Campbell-Husted [loss adjusters who investigated claims made against United National], some other means [i.e. means other than discovery of documents against the plaintiffs] have to be found to enable them to do so'.³⁶ The principal places of business of both PGA and Campbell-Husted were in the US.

Lord Brandon went on to mention a number of preliminary matters, including 'the existence of an essential difference between the civil procedures of the High Court in England on the one hand, and of courts of the United States on the other, with regard to what may be compendiously described as pre-trial discovery'.³⁶ His Lordship drew attention particularly to the fact that 'the civil procedure of courts in the United States differs essentially from that in the High Court in England in that under it parties to an action can compel, as against persons who are not parties to it, a full measure of pre-trial discovery, including both the disclosure and production for inspection and copying of documents, and also the giving of oral or written testimony. This power of compulsion can be, and regularly is, used at an early stage of an action.'³⁷ His Lordship also drew attention to (amongst other things) certain changes in the positions of the parties to the action which had occurred since the original hearing of South Carolina's summonses before Hobhouse J.

The reasoning upon which Hobhouse J had relied was in many respects similar to that of Griffiths LJ who delivered the leading judgment in the Court of Appeal. There Griffiths LJ said:

Once the parties have chosen or accepted the court in which their dispute is to be tried they must abide by the procedure of that country and that court must be master of its own procedure. Litigation is expensive enough as it is, and if a party fighting a case in this country has to face the prospect of fighting procedural battles in whatever other jurisdiction his opponent may find a procedural advantage it may impose intolerable burdens, and encourage the worst and most oppressive form of procedural forum shopping. We should set our face against any such situation developing.

His Lordship, having referred to 'severe dislocation to the timetable of the English litigation' as a readily foreseeable consequence of unrestrained access to foreign procedural remedies, continued:

As the judge [Hobhouse J] said: 'The court will lose control of its own proceedings. Furthermore, one party might be able to gain a very unfair advantage in the English procedure if he was able to take the deposition of and cross-examine a witness whom he would never call on his own behalf at the trial, for example, the employees or business associates of his opponent.'

He concluded: '... as a matter of principle the court must have an inherent jurisdiction to make any necessary order to ensure that the litigation is conducted in accordance with its own procedures'.³⁸

Lord Brandon, like Hobhouse J and the Court of Appeal, avowedly treated South Carolina's applications for injunctions as raising matters of principle—a corollary of this being that the question for decision was as to whether the circumstances of the case were such as to give the court power to grant the injunctions at all, rather than whether, it having such a power, it would be proper

³⁶ Ibid. 32.

³⁷ Ibid. 36.

³⁸ [1986] QB 348, 359, quoted by Lord Brandon at pp. 34-5.

to exercise it. Lord Brandon then invoked first principles: the general power of the High Court to grant injunctions is now basically a statutory one—it is a power to ‘grant an injunction in all cases in which it appears to the court to be just and convenient to do so’³⁹—but the power ‘has been circumscribed by judicial authority dating back many years’.⁴⁰ Lord Brandon then, having mentioned specifically three recent House of Lords cases, *Siskina (owners of cargo lately laden on board) v. Distos Compania Naviera SA*,⁴¹ *Castanho v. Brown and Root (UK) Ltd.*⁴² and *British Airways Board v. Laker Airways Ltd.*,⁴³ felt able to assert:

The effect of these authorities, so far as material to the present case, can be summarised by saying that the power of the High Court to grant injunctions is, subject to two exceptions to which I shall refer shortly, limited to two situations. Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable.⁴⁴

His Lordship then turned to the specific power to enjoin foreign proceedings:

... among the forms of injunction which the High Court has power to grant, is an injunction granted to one party to an action to restrain the other party to it from beginning, or if he has begun from continuing, proceedings against the former in a foreign court. Such jurisdiction is, however, to be exercised with caution because it involves indirect interference with the process of the foreign court concerned.⁴⁴

He acknowledged that this particular form of injunction may sometimes be granted in such circumstances as to constitute one exception⁴⁵ to the restriction of the exercise of the court’s power to the two above-mentioned situations:

This may occur where one party has brought proceedings against another party in a foreign court which is not the forum conveniens for the trial of the dispute between them, as that expression was defined and applied in *MacShannon v. Rockware Glass Ltd.* [1978] AC 795. In such a case the party who has brought the proceedings in the foreign court may not, by doing so, have invaded any legal or equitable right of the other party, nor acted in an unconscionable manner. The court nevertheless has power to restrain him from continuing his foreign proceedings on the ground that there is another forum in which it is more appropriate, in the interests of justice, that the dispute between the parties should be tried.⁴⁶

The instant case was, however, not concerned with a choice between two competing *fora*. It was, therefore, to be decided in the light of the restriction (which his Lordship had perceived) of exercise of the court’s power to two situations.

Two questions accordingly could fall to be answered. Had South Carolina shown that the re-reinsurers, by beginning and intending to prosecute their application to the US District Court, had invaded, or threatened to invade, a legal or equitable right of South Carolina for the enforcement of which the re-reinsurers were amenable to the jurisdiction of the court? Lord Brandon

³⁹ Supreme Court Act 1981, section 37 (1).

⁴¹ [1979] AC 210.

⁴³ [1985] AC 58.

⁴⁵ The other exception Lord Brandon saw as being constituted by the power to grant a *Mareva* injunction (to restrain a defendant from removing his assets out of the jurisdiction)—a situation with which the instant case was in no way concerned.

⁴⁰ [1987] AC 24, 39-40.

⁴² [1981] AC 557.

⁴⁴ [1987] AC 24, 40.

⁴⁶ [1987] AC 24, 40.

mentioned the difficulty which counsel for South Carolina had had in identifying and formulating any such legal or equitable right; moreover, neither Hobhouse J nor the Court of Appeal had based their decisions on the infringement of such a right. The answer to this first question was, therefore, in the negative. But, secondly, had South Carolina shown that the re-reinsurers, by beginning and intending to prosecute their application to the US District Court, had acted in a manner which was unconscionable? Lord Brandon gave a negative answer to this question too, although he recognized that a contrary view was in some measure implicit in the reasoning of the courts below. He addressed himself to three particular elements in, or underlying, that reasoning.

First, he found himself unable to accept that the re-reinsurer's conduct was an interference with the court's control of its own process: '... the basic principle underlying the preparation and presentation of a party's case in the High Court in England is that it is for that party to obtain and present the evidence which he needs by his own means, provided always that such means are lawful in the country in which they are used'.⁴⁷ Lord Brandon pointed out that, if PGA and Campbell-Husted had *voluntarily* allowed the re-reinsurers to inspect and copy the documents in question, this would not have been seen as any interference with the English court's control over its own process. Why, then, should the making of an application to be allowed (in conformity with the law of the US) to inspect and copy be seen as constituting unconscionable interference?

Secondly, Lord Brandon rejected the notion that, the procedure of US courts being significantly different from that of the English courts, the parties, by submitting to the jurisdiction of an English court, had to be taken to have accepted its procedure. He again indicated that nothing that the parties had done interfered with the procedure of the English court: 'All they have done is what any party preparing his case in the High Court here is entitled to do, namely to try to obtain in a foreign country, by means lawful in that country, documentary evidence which they believe that they need in order to prepare and present their case.'⁴⁷ The English rule which does not permit pre-trial discovery of documents against non-parties is simply for the protection of these third parties, and the rule should seemingly not be given extraterritorial effect.

Thirdly, Lord Brandon considered possible hardship in the form of increased costs and inconvenience. He took the view that the former could have been largely avoided, and of the latter he said: '... if there is a reasonable possibility that such inconvenience is the price of justice being fully done at the trial of the two English actions, then it seems to me to be the price which must necessarily be paid'.⁴⁸

Lord Brandon concluded: '... there was, in my opinion, no such interference with the procedure of the English High Court by the re-re-insurers as would amount to unconscionable conduct on their part, and so justify, in accordance with the basic principles which I stated earlier, the exercise of the court's power to grant injunctions against them'.⁴⁹ The other members of the House (Lord Bridge of Harwich, Lord Brightman, Lord Mackay of Clashfern and Lord Goff of Chieveley) agreed with this conclusion, but Lord Goff expressed reservations (with which Lord Mackay associated himself) about one matter of wider importance.

⁴⁷ Ibid. 41-2.

⁴⁸ Ibid. 43.

⁴⁹ Ibid. 44.

Lord Goff said:

I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available. In particular, I do not regard the exercise of the power to restrain a person from commencing or continuing proceedings in a foreign forum as constituting an exception to certain limited categories of case in which it has been said that the power may alone be exercised. In my opinion, restraint of proceedings in a foreign forum simply provides one example of circumstances in which, in the interests of justice, the power to grant an injunction may be exercised.⁵⁰

With this the present writer would respectfully, but emphatically, agree. In his speech Lord Brandon lucidly elaborated very useful guide-lines or rules of thumb, but it would constitute an emasculation of the court's inherent power to regard them as constituting more than guide-lines or rules of thumb. Even to confine the exercise of that power within the (admittedly generous) limits of unconscionability would be unduly restrictive, would be inimical to the concept of discretion, and could work something less than justice in a particular case. The primary meaning ascribed to the word 'unconscionable' in the *Oxford Shorter Dictionary* is 'Having no conscience; unscrupulous; monstrously extortionate; harsh, etc.'. There could be a case in which the balance of justice would indicate the granting of an injunction, although the party's behaviour was less dire.

Lord Goff also took the opportunity to refer to what he had said two years previously in the Court of Appeal in the unreported⁵¹ case of *Bank of Tokyo Ltd. v. Karoon*, and he expressed respectful doubts as to whether Lord Scarman's speech in *Castanho v. Brown and Root (UK) Ltd.*⁵² 'contains the last word on the subject'.⁵³ In the *Bank of Tokyo* case, Goff LJ (as he then was) had said:

Lord Scarman did not apparently consider it necessary to give reasons for his opinion that the principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings, and that it was therefore unnecessary, having regard to the decisions of the House of Lords in *The Atlantic Star* [1974] AC 436 and *MacShannon's* case [1978] AC 795, both of which related only to a stay of English proceedings, to examine earlier case law on restraint of foreign proceedings,⁵⁴

and had continued later in his judgment:

In *Castanho v. Brown and Root (UK) Ltd.* [1981] AC 557 Lord Scarman has taken the principle of forum non conveniens as developed in relation to a stay of English proceedings where it was expressly developed in order to adopt a less nationalistic approach, i.e. to render the English courts less tenacious of proceedings started within its jurisdiction, and has applied it *inversely* in cases of restraint by the English courts of foreign proceedings. The effect would appear to be, not only that in cases of restraint of foreign proceedings the very restrictive principle of protection of the English jurisdiction has been abandoned, but also that the English court will now be more free to grant injunctions restraining foreign proceedings than it was in the past under the old case law. We should perhaps not be surprised to discover that the approach of Lord Scarman in *Castanho* is different from the approach of courts in the United States. There, as here, the grant of stay of proceedings depends upon the application of the principle of forum non conveniens; see, e.g., *Piper Aircraft Co. v. Reyno*, 454 US 235. But the grant of an injunction restraining foreign

⁵⁰ [1987] AC 24, 44.

⁵¹ But now noted: [1987] AC 45.

⁵² [1981] AC 557.

⁵³ [1987] AC 24, 45.

⁵⁴ *Bank of Tokyo v. Karoon* [Note], [1987] AC 45, 61-2.

proceedings depends upon the twin principles of protection of the jurisdiction of the court of the forum, and of preventing evasion of important public policies of the forum; and in each case the principles have been stated and applied in restrictive terms. So cases of stay of proceedings and of restraint of foreign proceedings are regarded as being founded upon different principles.⁵⁵

Again, the present writer would respectfully agree with Lord Goff's approach. The impact of Lord Scarman's assimilation of the test to be used in the context of an application to enjoin foreign proceedings, with that now to be used in the context of an application to stay English proceedings, could, no doubt, be lessened (1) by emphasizing that it does not follow that the weight to be attached to various factors may not differ in the two different types of case, and (2) by differentiating between the incidence (and perhaps the quantum) of proof.⁵⁶ These may often be effective palliatives, but one cannot fail to see the strength of the basic assumption, made in the US and referred to by Lord Goff, that 'cases of stay of proceedings and of restraint of foreign proceedings are . . . founded upon different principles'. Perhaps Lord Scarman in *Castanho v. Brown and Root (UK)* overreached himself in the laudable pursuit of simplicity and uniformity.⁵⁷

Recognition of the validity of compulsory acquisition by a foreign State of shares in a company incorporated there

Case No. 3. The compulsory acquisition by a foreign State of shares in a local company will be regarded as generally effective elsewhere. Such an acquisition is for compensation and has many of the characteristics of a sale, albeit an enforced one. However, severe limits are placed upon the international recognition to be accorded to an expropriation, the general principle being that it will not be given extraterritorial effect, i.e. it will be accorded recognition only in so far as it relates to property situated within the expropriating State at the time of expropriation. The recent House of Lords case of *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*⁵⁸ was described by Lord Templeman, who delivered one of the two leading judgments, as being 'a simple case of compulsory acquisition'.⁵⁹ It is, therefore, scarcely a matter for remark that the House confirmed that, the State of Spain having so acquired all the shares in a Spanish company, the company (acting through its new directors) was entitled to recover its English assets. What is perhaps surprising is that Lord Templeman, and to some extent Lord Mackay of Clashfern, devoted so much of their judgments to consideration of questions of, and case law relating to, expropriation. The explanation of this could perhaps lie in the way in which the matter arose.

In 1983 decrees were passed in Spain by virtue of which the State of Spain became entitled to control a Spanish company and thus indirectly its 'subsidiary', Williams & Humbert Limited, an English company. Actions over the ownership of certain trade marks were subsequently commenced by this English company, and actions in tort were brought, too, by certain Spanish companies over whom the State of Spain had also acquired control. The defendants to the actions sought

⁵⁵ [1987] AC 45, 63.

⁵⁶ See, e.g., the judgment of Parker LJ in *Metall and Rohstoff AG v. A.C.I. Metals (London) Ltd.*, [1984] 1 Lloyd's Rep. 598, 613, and Note in this *Year Book*, 55 (1984), pp. 355-9.

⁵⁷ And see now *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak*, [1987] 3 WLR 59.

⁵⁸ [1986] AC 368. For a note on the public international law aspects of this case, see this *Year Book*, 56 (1985), pp. 316-19.

⁵⁹ [1986] AC 368, 434.

to defend on the basis *inter alia* that the Spanish decrees were penal in nature and should not, therefore, be enforced. The plaintiff sought to strike out this defence. The House of Lords held that it had been correctly struck out. The defendants' contention was that the plaintiffs were 'not entitled to the relief sought or any relief by reason of the fact that the proceedings represent an attempt to enforce a foreign law which is penal or which otherwise ought not to be enforced by this court and further, or alternatively, that it would be contrary to public policy to grant the relief sought or any relief'.⁶⁰

Lord Templeman said: 'There is undoubtedly a domestic and international rule which prevents one sovereign state from changing title to property so long as that property is situate in another state'. . . . But this territorial limitation on compulsory acquisition is not relevant to the acquisition of shares in a company incorporated in the acquiring state.'⁶² Later in his judgment his Lordship referred to *Luther v. Sagor*⁶³ and to *Princess Paley Olga v. Weisz*⁶⁴ (although both cases were cases of expropriation rather than compulsory acquisition) and said of them:

These authorities illustrate the principle that an English court will recognise the compulsory acquisition law of a foreign state and will recognise the change of title to property which has come under the control of the foreign state and will recognise the consequences of that change of title. The English court will decline to consider the merits of compulsory acquisition.⁶⁵

Although the assimilation of cases of expropriation and cases of compulsory acquisition could in some other contexts be a source of confusion, it was without consequence in the present context, because the limitations upon the recognition of the latter are less severe than those placed upon the recognition of the former. In the circumstances (apart from the possibility of their being penal, revenue-producing or contrary to *forum* public policy), the Spanish decrees would be recognized as transferring title, even if they were expropriatory.

In the light of the defendants' plea Lord Templeman and Lord Mackay had to consider whether the relief sought by the plaintiffs would involve the *enforcement* of a foreign penal law. This is an area in which a 'fine' distinction has to be drawn between, on the one hand, the indirect enforcement of such a law which is prohibited, and, on the other hand, the mere 'taking account of' such a law which is permissible. A parallel difficulty can arise with regard to foreign revenue laws, although there it is seemingly more capable of easy solution by reference to a rule of thumb: would allowing the case to proceed make it more likely that the tax will be collected?⁶⁶ With regard to penal laws the guide-lines are less clear. However, it is to be remembered that a law is only castigated as being penal to the extent that its purpose is to punish and to punish at the instance of the State. Even if the purpose of the Spanish decrees had been to punish, it is hard to see that the extent of the achievement of that purpose would be significantly enhanced if the plaintiffs in the instant case were to be allowed to pursue their action.

⁶⁰ [1986] AC 368, 427.

⁶¹ This is surely subject to the qualification that, in the (perhaps relatively rare) event of the change being recognized in the other State (the *situs*), it would be recognized elsewhere.

⁶² [1986] AC 368, 428.

⁶⁴ [1929] 1 KB 718.

⁶³ [1921] 3 KB 532.

⁶⁵ [1986] AC 368, 431.

⁶⁶ Contrast, e.g., *Rossano v. Manufacturers' Life Insurance Co.*, [1963] 2 QB 352 (indirect enforcement) with *Re Emery's Investment Trusts*, [1959] Ch. 410 (mere taking account of).

In the *Williams & Humbert* case Lord Templeman (expressly) and Lord Mackay (impliedly) doubted whether the Spanish decrees had in fact been penal, but their Lordships were clear that, even on the assumption that they were penal, granting the relief sought by the plaintiffs would not involve their indirect enforcement. Lord Templeman cited with approval the words of the trial judge, Nourse J, to the effect that the object of the Spanish decrees 'was to acquire direct ownership and control of Rumasa [the Spanish company] and the two banks and indirect ownership and control of Williams and Humbert. That object has been duly achieved by perfection of the state's title in Spain. Accordingly, on a simple but compelling view of the matter there is nothing left to enforce.'⁶⁷ 'An English court', said Lord Templeman 'by English law and international law must recognise that Spanish law and accept its consequences.'⁶⁸ A failure to accept as a consequence the plaintiffs' entitlement would, as Lord Templeman tellingly pointed out, mean that 'the practical effect of the Spanish law was to release from liability outside Spain every tortfeasor guilty of inflicting a civil wrong on any company comprised in the Rumasa group and every contracting party who defaulted in his obligations towards any company comprised in the Rumasa group'.⁶⁹ Lord Mackay said: 'Since the present actions are not expressly founded upon the Spanish law nor do the plaintiffs' claims rely to an extent on the existence or the provisions of the law the claim that the present actions are actions for enforcement of the law is at first sight a startling one.'⁷⁰ Later in his speech his Lordship said: 'In the present case there is no allegation of any unsatisfied claim under the law of the Kingdom of Spain on which counsel for the appellants found. No provision of that law would provide a foundation for making any of the claims in question in the actions with which this appeal is concerned.'⁷¹

In the instant case the actions were being brought by English and Spanish companies to recover property to which, according to the pleadings, they were entitled even before the Spanish decrees were enacted. This made it patently difficult to contend that the actions constituted an attempt to enforce those decrees. It is submitted, however, that even if this had not been the case, i.e. even if the same causes of action had arisen but not until after the enactment of the Spanish decrees, the decision ought not to have been different. The line between bare recognition and indirect enforcement of penal laws is an elusive one, and although in the *Williams & Humbert* case the chronology factor may have made elusion less likely, that factor cannot in itself often justifiably affect substantive considerations.⁷²

Capacity to remarry after a foreign divorce

Case No. 4. The significance of the Court of Appeal case of *Lawrence v. Lawrence*⁷³ as a common law authority has been at least partially superseded, but at the same time one interpretation of its underlying philosophy has been substantially confirmed, by section 50 of the Family Law Act 1986. Part II (in which section 50 is included) of that Act is concerned with the

⁶⁷ [1986] AC 368, 428-9.

⁶⁸ Ibid. 433.

⁶⁹ Ibid. 429.

⁷⁰ Ibid. 437.

⁷¹ Ibid. 441.

⁷² For trenchant criticism of particularly important procedural aspects of *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, see F. A. Mann, *Law Quarterly Review*, 102 (1986), p. 191 and *ibid.*, 103 (1987), p. 26.

⁷³ [1985] Fam. 106.

recognition of divorces, annulments and legal separations. Section 50 provides:

Where, in any part of the United Kingdom—. . . (b) the validity of a divorce or annulment is recognised by virtue of this Part, the fact that the divorce or annulment would not be recognised elsewhere shall not preclude either party to the marriage from re-marrying in that part of the United Kingdom or cause the re-marriage of either party (wherever the re-marriage takes place) to be treated as invalid in that part.

In *Lawrence v. Lawrence*, which was decided before the 1986 Act received the Royal Assent,⁷⁴ the trial judge and three members of the Court of Appeal were at one in upholding the validity of a marriage. The four judgments, however, display a diversity of varying combinations of different considerations of policy and of logic. The marriage in question had been celebrated in Nevada. The woman was a Brazilian national domiciled in Brazil. Under Brazilian law she had no capacity to enter into the marriage on the ground that she was at the time still the wife of another man. A unanimous holding that the marriage was nevertheless to be regarded as valid in England invites explanation and justification. The former, if not the latter, is largely to be found in the circumstance that on the day immediately preceding the Nevada marriage ceremony, the woman had obtained a divorce from her husband in Nevada, the jurisdiction of the Nevada court being founded on six weeks' residence there—this being regarded as 'domicile'. In these circumstances the English court was, indeed, statutorily bound to recognize the divorce.⁷⁵ There was, however, at that time, no express statutory requirement that the parties to the divorce be consequentially regarded as having the capacity to remarry regardless of the circumstances: section 7 of the Recognition of Divorces and Legal Separations Act 1971 limited any such requirement to cases of remarriage in Great Britain. It is, however, to be observed that section 50 of the new Family Law Act 1986 contains no such limitation.

The issue in *Lawrence v. Lawrence* was as to whether the mere fact that a Nevada divorce was entitled to recognition in England required an English court to reach out so as to confer capacity upon a Brazilian national domiciled in Brazil (who had been a party to that divorce) to contract a subsequent marriage in Nevada, and to do so notwithstanding her lack of capacity under the law of Brazil. Ackner LJ, who delivered the leading judgment of the Court of Appeal, gave what was in effect an unqualified affirmative answer to this question. His Lordship said: 'The essential function of a decree of divorce is to dissolve the marriage hitherto existing between the parties. I consider that it is plainly inconsistent with recognising a divorce to say in the same breath that the marriage which it purported to dissolve continues in existence. Such recognition would be a hollow and empty gesture';⁷⁶ and his Lordship concluded 'that any incapacity said to be due to a pre-existing marriage cannot be relevant where the validity of the divorce dissolving such a marriage has to be recognised under the Act'.⁷⁷ Another member of the Court of Appeal, Sir David Cairns, appears to have relied upon two distinct

⁷⁴ Although (at the time of writing) the Act has now received the Royal Assent, it is not yet in force. It is anticipated that it will be brought into force in late 1987 or early 1988.

⁷⁵ By virtue of the Recognition of Divorces and Legal Separations Act 1971, either on the ground of the former husband's US nationality (section 3 (1) (b)), or on the ground of his wife's (the present respondent's) 'domicile' as defined in Nevada (sections 3 (1) (a) and 3 (2)).

⁷⁶ [1985] Fam. 106, 123.

⁷⁷ Ibid. 124-5.

grounds for upholding the validity of the Nevada marriage, one of which was substantially in accord with the approach of Ackner LJ.⁷⁸

The alternative ground upon which Sir David Cairns relied largely reflected the approach that had been taken by Lincoln J, the trial judge. The husband petitioner sought a declaration that his Nevada marriage to the respondent wife was valid. The respondent wife sought a declaration that it was null and void. At the time of the marriage, although the respondent, a Brazilian national, was domiciled in Brazil, the petitioner, a US national, was domiciled in England. Moreover, the intention of the parties had been to set up their matrimonial home in England, and after a brief stay in the US this intention was implemented. Lincoln J was satisfied that, had the marriage continued to prosper, it would have been likely that England would have remained the matrimonial home. Lincoln J, adopting traditional private international law methodology, saw the issue as being one of capacity to marry. He impliedly rejected any *a priori* assumption that all issues of capacity to marry are to be determined by reference to the same law and he focused his attention on identification of the law applicable to the particular ground—namely bigamy—upon which the Nevada marriage was alleged to be void. His Lordship found previous authority on choice of law on this issue to be sparse and partially inconsistent, and his Lordship concluded:

If the application of the criterion of real and substantial connection results in the marriage being held valid and the application of the dual domicile criterion results in invalidation, in my view the former should prevail. I leave open the question whether the vice versa proposition should also hold good.⁷⁹

It is submitted with respect that the vice versa proposition does also hold good: it is very unlikely that the marriage would have been held invalid on the ground of bigamy if the woman had had capacity under Brazilian law to enter into it, even if she had lacked capacity under what may be called the law of the matrimonial home. So interpreted, Lincoln J's approach has an obvious affinity with the opinion expressed by Sir David Cairns in the Court of Appeal when, with reference to the law of the pre-marriage domicile and that of the intended matrimonial domicile, he said: 'My own inclination would be to hold that either basis of recognition would suffice'.⁸⁰ What is here postulated is a choice of law rule of alternative validating reference. The policy justification for it rests upon what may be loosely described as a presumption of (or prejudice in favour of) validity of marriage. This presumption (or prejudice) does not itself derive from any supposition that *a priori* marriage is better than non-marriage. It simply rests upon the desirability of giving effect to the supposed wishes and intentions of the parties, whenever this is permissible by the law of a country with which there is some significant connection. The place of a party's domicile qualifies in this regard. A country of real and substantial connection also qualifies almost by definition. This may sometimes be adverted to as the place of the intended and actual matrimonial home. Not too much time should be spent striving after precise formulation. Theoretically ill-defined, a country of real and substantial

⁷⁸ The reasoning of the third member of the court (Purchas LJ) is somewhat idiosyncratic. It is not relevant to this present commentary and has been adverted to by the present writer elsewhere (*Law Quarterly Review*, 101 (1985), pp. 496, 500-1).

⁷⁹ [1985] Fam. 106, 115.

⁸⁰ *Ibid.* 134.

connection will in practice usually be easily and instinctively identifiable, as it was in *Lawrence v. Lawrence*. If no such country is identifiable, this will be because on the facts of the case there seemingly is no such country; and then reference must by default be exclusively to the law of the party's ante-nuptial domicile.⁸¹

However, the approach taken by Ackner LJ in *Lawrence v. Lawrence* seems to imply, and section 50 of the Family Law Act 1986 expressly provides, that if a foreign divorce is recognized in England and even if the facts display no connection with England, it inexorably follows that no subsequent marriage of one of the parties to that divorce is ever to be denied validity in England on grounds of non-recognition of the divorce elsewhere. That the divorce would not be recognized (and so the parties to it would lack capacity to remarry) under the law of the place of celebration, the laws of the nationalities, domiciles and residences of the parties to the subsequent marriage, the law of the intended and actual matrimonial home, and the laws of the place of real and substantial connection, is all to be seen by an English court as being of no moment. It is a strong position to take. It is a position devoid of policy justification and one which could permit unwarranted (and often absurdly pretentious) assertions of extra-territoriality abhorrent to international comity.

It might be contended that the position will in practice be ameliorated because, in the circumstances envisaged, the issue of the validity of the marriage will be unlikely to arise in English proceedings. However, on the contrary, the issue could easily arise collaterally, for example in the context of succession. Or, indeed, it could arise more directly if some years later one or other party to the 'marriage' were to become domiciled or resident in England and wish to marry again: the validity ascribed to that previous 'marriage' would constitute a bar to his or her doing so.

One final comment. In *Lawrence v. Lawrence* the Nevada divorce was not recognized in Brazil. If it had been recognized there, but the effect of this under Brazilian law had nevertheless not been to enable the wife to remarry (at least during the lifetime of her former husband), it seems clear that this would have made no difference to the decision. Section 50 of the 1986 Act, however, only forbids denial of capacity to remarry on the ground that the prior decree would not be recognized elsewhere: it does not forbid it on the ground that, although the prior decree would be recognized this would not (under the law of another country) confer freedom to remarry. However, if the approach of Ackner LJ were to be seen as embodying the *ratio decidendi* of *Lawrence v. Lawrence*, the authority of the case would, at least impliedly, cover this latter situation. But then, if the approach of Ackner LJ does embody the *ratio*, section 50 (at least with regard to the effect of prior divorces)⁸² is otiose.

⁸¹ A third validating possibility was permitted by the Recognition of Divorces and Legal Separations Act 1971, section 7 (as amended), in cases in which the later marriage takes place in the UK. This limited compromise was acceptable because, even in the relatively rare case in which the marriage is celebrated in the UK and yet the marriage has no significant connection with any part of the UK, it could be contended that a court, when asserting the validity of a marriage celebrated within its jurisdiction on the basis that any defect deriving from the invalidity of a prior divorce which is locally recognized is to be disregarded, is acting reasonably.

⁸² The position at common law with regard to prior nullity decrees is not clear, but there would appear to be no reason to suppose that it should differ from that with regard to divorce decrees.

Transnational divorces

Case No. 5. For the House of Lords in *R v. Secretary of State for the Home Department, ex parte Ghulam Fatima*⁸³ to have reversed the decision of the trial judge and the Court of Appeal⁸⁴ would have involved eccentric interpretation of the provisions of the Recognition of Divorces and Legal Separations Act 1971. Given the wording of sections 2 and 3 (1) of that Act, dismissal of the appeal to their Lordships' House would appear to have been in effect inevitable, and Lord Ackner (with whom Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Templeman and Lord Mackay of Clashfern agreed) was able to dispose of the matter in a speech occupying little more than four pages in the Law Reports. The interest of the appeal lies not so much in its outcome as in Lord Ackner's brief reference to policy considerations.

The central question in the case was as to whether recognition should be accorded to a talaq divorce. A Pakistani national, who had settled in England, pronounced talaq in England against his wife, who was resident in Pakistan. In compliance with the Pakistan Muslim Family Laws Ordinance 1961 he sent a written notice that he had pronounced the talaq to the chairman of his local union council in Pakistan and to his wife. Under the provisions of the Ordinance, his marriage was dissolved ninety days after the receipt of the notice by the chairman of the local union council. Taylor J had held that the divorce could not be recognized as a valid decree under the provisions of sections 2 and 3 (1) of the 1971 Act (as amended), and this had been upheld in the Court of Appeal. The present writer has already offered some comments⁸⁵ on the judgment of the Court of Appeal, and, as Lord Ackner's speech was largely a confirmation of that judgment, the present additional commentary can be brief.

The Recognition of Divorces and Legal Separations Act 1971 provides by section 2, as amended:

Sections 3 and 5 of this Act shall have effect . . . as respects the recognition in the United Kingdom of the validity of overseas divorces . . . that is to say, divorces . . . which—(a) have been obtained by means of judicial or other proceedings in any country outside the British Isles; and (b) are effective under the law of that country.

and by section 3:

(1) The validity of an overseas divorce or legal separation shall be recognised if, at the date of the institution of the proceedings in the country in which it was obtained—(a) either spouse was habitually resident in that country; or (b) either spouse was a national of that country.

The House of Lords held that the pronouncement of the talaq (in England) initiated, and accordingly formed a part of, the proceedings for divorce under Pakistani law. The pronouncement constituted 'the institution of the proceedings' for the purposes of section 3 (1) of the 1971 Act. Accordingly, the divorce, having been obtained partly in England and partly in Pakistan, did not qualify for recognition as an 'overseas divorce'. 'Proceedings' in section 2 (a) denotes one single set of proceedings which have to be 'instituted' in the same country as that in which the divorce is ultimately 'obtained'.

⁸³ [1986] AC 527.

⁸⁴ [1985] 2 QB 190.

⁸⁵ *This Year Book*, 55 (1984), at pp. 359-61.

It is a sombre commentary on the state of the law that, had the husband visited Pakistan, however briefly, and pronounced the talaq whilst there, the divorce would then seemingly have been recognized. It is indeed far from clear why the *locus* or place of a divorce should assume crucial significance in matters of recognition. Its use as a connecting factor can permit or invite evasion.

In the course of his speech Lord Ackner made reference⁸⁶ to section 16 (1) of the Domicile and Matrimonial Proceedings Act 1973, which had the effect of reversing the decision in *Qureshi v. Qureshi*,⁸⁷ where recognition had been accorded to full talaq proceedings which had taken place entirely within the UK. Lord Ackner continued:

It is thus clearly the policy of the legislature to deny recognition to divorces obtained by persons within the jurisdiction, and therefore subject to the laws of the United Kingdom, by any proceedings other than in a United Kingdom court. It would seem contrary to that policy to encourage the obtaining of divorces essentially by post by Pakistani nationals resident in this country by means of the talaq procedure.⁸⁸

It is submitted, with respect, that policy considerations ought perhaps to be painted on a broader canvas. The root difficulty surely lay in the failure of Parliament to make specific provision for the recognition of transnational divorces—that is to say divorces in which the various components of the necessary procedure take place in different countries. The position would seem to be that such a divorce is simply never entitled to recognition. A transnational divorce may still be a rarity in Western culture-based systems of law. It is, however, not unreasonable to conjecture that a combination of advances in information exchange technology and of progressive relaxation of taboos about divorce may lead to a change. It may become permissible to enquire why divorce by correspondence (including international correspondence) or, perhaps, even by telex should be regarded as less acceptable than the perfunctory charade which already constitutes uncontested divorce proceedings in some jurisdictions. Indeed, the modern talaq⁸⁹ proceedings, as exemplified in *R v. Secretary of State for the Home Department, ex parte Ghulam Fatima* itself, might be seen as comparing favourably with some modern uncontested judicial divorce proceedings.

In a comment made two years ago⁹⁰ on the Court of Appeal judgment in the case, the present writer suggested that there may be room for the view that a transnational divorce, wherever pronounced, should be accorded recognition if recognized as valid under the law or laws of the habitual residences of *both* parties at the time at which it was pronounced. Such a rule would, of course, operate without prejudice to recognition under other existing rules.

It may now be noted that the new Family Law Act 1986,⁹¹ when it comes into

⁸⁶ [1986] AC 527, 534.

⁸⁷ [1972] Fam. 173.

⁸⁸ [1986] AC 527, 534.

⁸⁹ Lord Ackner contrasted the modern talaq with the traditional 'bare' talaq: 'In traditional Islamic law the husband has the right unilaterally to repudiate his wife, without showing cause and without recourse to a court of law. Such divorce is effected by the announcement of the formula of repudiation, a talaq, and in traditional law a divorce by talaq would take the simple form of the husband announcing talaq three times. The divorce then becomes immediately effective and irrevocable. Such a form of talaq has been called "a bare talaq"' (ibid. 531).

⁹⁰ *This Year Book*, 55 (1984), at p. 361.

⁹¹ See footnote 74 above. This Act provides for the recognition of annulments and legal separations as well as for the recognition of divorces.

force, will introduce a new differentiation, between overseas divorces 'obtained by means of proceedings',⁹² and those 'obtained otherwise than by means of proceedings'.⁹³ In the former the focus will be upon the existence of a necessary jurisdictional link at 'the date of the commencement of the proceedings', whereas in the latter focus will be upon its existence at 'the date on which it [the divorce] was obtained'.⁹⁴ Moreover, whereas an acceptable jurisdictional link in the former case will be constituted by the habitual residence, domicile or nationality of either party,⁹⁵ in the latter case what will be required is that both parties be domiciled in the country of rendition (or alternatively that one party be domiciled there, and the divorce be recognized in the domicile of the other party).⁹⁶ In all cases the overseas divorce will still have to be effective under the law of the country in which it was 'obtained'.⁹⁷

The new Act will at least take cognisance of the fact that the place of the commencement of divorce proceedings may be different from the place in which a divorce is obtained. However, the required jurisdictional link in the case of the overseas divorce 'obtained otherwise than by means of proceedings' is perhaps unduly restrictive: it is difficult to see why such a divorce, if simply recognized under the law or laws of the domiciles (or habitual residences) of both parties, should not be accorded recognition internationally. At all events it is unlikely that the outcome of a case such as *R v. Secretary of State for the Home Department, ex parte Ghulam Fatima* would be different, unless it were to be shown that both parties to the divorce were domiciled in Pakistan (where it would be seen as having been obtained) at the time at which it was so obtained. Moreover, even if their domicile in Pakistan were established, a provision of the new Act would create a further difficulty. Section 46 (2) (c) requires that recognition be withheld from an overseas divorce obtained 'otherwise than by means of proceedings' if either party to the marriage was habitually resident in the UK throughout the period of one year immediately preceding the date on which the divorce was obtained. The spectre, raised by Lord Ackner,⁹⁸ of the Pakistani resident in England obtaining a divorce 'essentially by post' by means of the talaq procedure, is doubly exorcized.

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⁹² Section 46 (1).

⁹⁵ Section 46 (1) (b).

⁹⁸ [1986] AC 527, 534.

⁹³ Section 46 (2).

⁹⁶ Section 46 (2) (b).

⁹⁴ Section 46 (3).

⁹⁷ Section 46 1 (a) and 2 (a).

DECISIONS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS DURING 1986*

Just satisfaction (Article 50)—friendly settlement—non-pecuniary damage

Case No. 1. Barthold case (Application of Article 50).¹ In view of the settlement agreed between Dr Barthold and the Federal German Government in respect of the former's claim to just satisfaction for pecuniary loss under Article 50 of the Convention, the Court unanimously decided to strike this case out of its list. As regards the applicant's claim for non-pecuniary loss, the Court decided that in all the circumstances no compensation was required.

In its judgment on the merits in 1985 the Court held that the applicant, who was a veterinary surgeon, had been the victim of a breach of Article 10 of the Convention (right to freedom of expression) when a court in the Federal Republic issued an injunction restraining him from repeating certain statements in the Press on the grounds that this would be unprofessional conduct.² The question of just satisfaction under Article 50 was reserved.

Article 50 of the Convention provides:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

Following the decision on the merits, the applicant and the Government succeeded in negotiating a partial settlement of the claim. Under its terms Dr Barthold received the sum of 28,000 DM in satisfaction of his claim for pecuniary loss and in return agreed not to pursue further proceedings.

In cases of this kind the Court's function is defined by Rule 53 (4) of the Rules of the Court, which provides:

If the Court is informed that an agreement has been reached between the injured party and the Party liable, it shall verify the equitable nature of such agreement and, where it finds the agreement to be equitable, strike the case out of the list by means of a judgment . . .

In the light of the agreement between Dr Barthold and the Government and the absence of any objection from the Commission, the Court had no difficulty in deciding that the settlement was equitable and that as regards this aspect of the claim, the case should be removed from its list.

The one outstanding issue was the applicant's claim for the non-pecuniary

* © Professor J. G. Merrills, 1987. I should like to express my appreciation to the Registrar of the Court for his kind co-operation in the preparation of these notes.

¹ European Court of Human Rights (ECHR), judgment of 31 January 1986, Series A, No. 98. The Court consisted of the following Chamber of Judges: Wiarda (President); Thór Vilhjálmsson, Bindschedler-Robert, Pettiti, Russo, Bernhardt, Gersing (Judges).

² ECHR, judgment of 25 March 1985, Series A, No. 90, and see this *Year Book*, 56 (1985), p. 341.

damage which, as the Court put it, 'he alleged he had suffered as a result of the proceedings taken against him before the domestic courts, the public discussion of those proceedings, a heart attack brought about by these circumstances as a whole and the manner in which the proceedings were conducted before the Convention institutions'.³ The applicant assessed this damage at 50,000 DM.

The Court rejected the claim. There was no evidence that the heart attack was occasioned by the breach of Article 10 and while the other factors may have caused the applicant some non-material damage, the Court regarded its judgment on the merits as affording sufficient just satisfaction under this head. The claims in question were also put forward after the time-limit specified by the President which had led the Government to question their admissibility. In the circumstances, however, the Court held that there was no need to deal with this point.

Right of property (Article 1 of Protocol No. 1)—the meaning 'in the public interest' and the reference to 'the general principles of international law' in Article 1 of Protocol No. 1—the margin of appreciation—discrimination on grounds of property (Article 14)—right of access to the courts (Article 6 (1))—right to an effective remedy before a national authority (Article 13)

*Case No. 2. James and others case.*⁴ The Court held unanimously that the compulsory transfer of the applicants' property under the Leasehold Reform Act 1967, as amended, did not give rise to a breach of Article 1 of Protocol No. 1 on the part of the United Kingdom. It also rejected further allegations that the circumstances of the transfer involved discrimination contrary to Article 14 of the Convention and that the remedies available to the applicants failed to comply with Article 6 (1) and Article 13.

This case concerned legislation in the UK affecting the system of long leaseholds. The applicants were, or had been, trustees acting under the will of the 2nd Duke of Westminster, whose family had developed a large estate in Belgravia in central London. The applicants' complaint was that as trustees they had been deprived of their ownership of a number of long leasehold properties in this estate through the exercise by the occupants of rights of purchase conferred by the Leasehold Reform Act 1967.

The Act, as amended by subsequent legislation, provides that tenants who are residing in houses held on long leases have the right to purchase the freehold of the house compulsorily, on prescribed terms and subject to certain conditions.

In broad terms the principal conditions laid down are as follows:

- (a) the tenancy must be a 'long' tenancy, defined as more than twenty-one years;
- (b) the rateable value of the house must not exceed £750, or £1,500 if the house is in Greater London;
- (c) the annual rent must be a 'low' rent, defined as less than two-thirds of the rateable value;
- (d) the tenant must occupy the house as his only or main residence and must have done so for at least three years before giving notice of his intention to exercise his rights under the Act.

³ Judgment, para. 9.

⁴ ECHR, judgment of 21 February 1986, Series A, No. 98. This case was decided by the plenary Court.

If the above conditions are satisfied, the tenant can buy the freehold on one or other of two bases of valuation. The effect of the basis of valuation applicable to lower range properties ('the 1967 basis') is that the tenant pays approximately the site value and nothing for the buildings on the site. The basis of valuation applicable to higher range properties ('the 1974 basis') is more favourable to the landlord and provides a price approximately equivalent to the market value of the site and house with a sitting tenant. For the purpose of assessing the price payable, the house is valued as at the date of the tenant's notice, and not at the date when the valuation is being carried out.

According to the White Paper announcing the Government's intention to introduce legislation, the Act was 'based on the principle that the land belongs in equity to the landowner and the house belongs in equity to the occupying leaseholder'. The Act was thus intended to give effect to what was regarded as the occupying tenant's 'moral entitlement' to the house.

In the present case the applicants submitted details of eighty transactions in which tenants exercised their powers under the legislation to acquire the freehold of residential properties in Belgravia which were part of the Duke of Westminster's estate. The applicants claimed that by having to sell on statutory terms, rather than on the open market, they had sustained losses ranging from £1,350 to £148,080 on each transaction. For properties in respect of which the 1967 basis of valuation applied, their losses amounted to £1,479,407 and for those in respect of which the 1974 basis of valuation applied, £1,050,496.

In their application to the Commission in October 1979 the applicants alleged that in the above circumstances the UK was in breach of Articles 6 (1), 13 and 14 of the Convention and of Article 1 of Protocol No. 1. In its report of May 1984, however, the Commission expressed the unanimous opinion that there had been no violation of any of these provisions. The Commission then referred the case to the Court.

The main issue in this case concerned Article 1 of Protocol No. 1 which provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The applicants suggested that since their complaint concerned the effect of the legislation on their ownership of specific properties, the Court should examine each individual act of enfranchisement for compliance with Article 1. The Court, however, agreed with the Commission that this was unnecessary. Since the applicants' complaint was in essence directed against the terms and conditions of the legislation, the Court saw its task as to review the legislation itself for compatibility with the Convention, taking the individual transactions into account as evidence of its practical impact.

It was conceded that the applicants were deprived of their possessions as a result of the contested legislation. The question was therefore whether the deprivation could be justified, and specifically whether it could be shown to be 'in the public interest'. The applicants' first argument here was that this test can only be satisfied when property is taken for a public purpose for the benefit of

the community in general. When, as here, property is transferred for the benefit of private individuals, this could never, according to the applicants, qualify as 'in the public interest'. On this point, which had not been considered before and is clearly important, the Court decided that the applicants were wrong. Deciding that 'the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest'⁵ the Court explained that no common policy could be discerned in the Contracting States which would justify outlawing such transfers in principle. Nor could such a restriction be read into Article 1, since 'the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being "in the public interest", even if they involve the compulsory transfer of property from one individual to another'.⁶

Having found that legislation of the type involved here is capable of being justified, the next question was whether it actually complied with the public interest test. In previous cases in which this issue has arisen the Court has attached considerable weight to the respondent State's margin of appreciation. Not surprisingly, this also featured prominently in the present case where the Court said:

Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.⁷

Moreover, as the Court went on to emphasize, in the present context the margin of appreciation is a wide one and the scope for judicial review correspondingly limited:

Furthermore, the notion of 'public interest' is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under Article 1 of Protocol No. 1 and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted.⁷

Using the above approach, the Court's examination of the contested legislation led it to conclude that the aim of the legislation was legitimate because 'the margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes, even where such legislation interferes with existing contractual relations between private parties and confers no direct benefit on the State or the community at large'.⁸ In this connection

⁵ Judgment, para. 40.

⁶ Ibid., para. 41.

⁷ Ibid., para. 46.

⁸ Ibid., para. 47.

the Court rejected the applicants' contention that the real motivation for the legislation was not public benefit but political advantage. The Court also held that the idea of the tenant's 'moral entitlement', though controversial, was not manifestly unreasonable and as such was also within the margin of appreciation.

Turning to the means chosen to achieve the aim, the Court recalled that in the *Sporrong and Lönnroth* case⁹ it decided that a measure depriving a person of his property must strike a fair balance between the general interest and the protection of the individual's rights. In other words 'a measure must be both appropriate for achieving its aim and not disproportionate thereto'.¹⁰

The applicants objected to the legislation on a number of grounds, none of which the Court found convincing. Thus the principle of enfranchisement itself could not be regarded as an inappropriate or disproportionate method of giving effect to the tenant's moral entitlement. For provided the legislature employed means that were reasonable, it was 'not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way . . .'.¹¹ Similarly, the restriction of the scope of the legislation to houses below a certain rateable value, and the subsequent extension to more valuable properties in 1974, could not be dismissed as irrational, or outside the margin of appreciation.

The applicants' most elaborate objections were directed against the arrangements for compensation. Article 1 is, of course, silent as to whether the availability and amount of compensation are salient considerations in assessing the lawfulness of a taking of property and this was the first occasion on which the Court has had to consider the issue. Its conclusion on this point was that 'compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants'.¹² The Court also agreed with the Commission as to the standard of compensation required and the factors to be taken into account in deciding whether that requirement had been met:

. . . the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain . . .¹²

Applying these principles to the facts, the Court decided that the compensation provided for in the legislation was not incompatible with Article 1. Having regard to the objective pursued by the legislation and the respondent's wide margin of appreciation, the applicants had not established that the 1967 basis of valuation failed to achieve the fair balance which was required. Moreover, despite the interval between the date of valuation and payment of the purchase price,

⁹ ECHR, judgment of 23 September 1982, Series A, No. 52, and see this *Year Book*, 53 (1982), p. 319.

¹⁰ Judgment, para. 50.

¹¹ *Ibid.*, para. 51.

¹² *Ibid.*, para. 54. In his concurring opinion Judge Thór Vilhjálmsson indicated his disagreement with this part of the judgment.

the prescribed compensation procedures did not, in the Court's view, lead to such long delays as to violate Article 1.

The Court also rejected two further arguments: that the deprivation was not 'subject to the conditions provided for by law' because the arrangements for compensation were unfair, and that the operation of the legislation was indiscriminate because there was no machinery for reviewing each proposed enfranchisement individually. The applicants also submitted that the legislation, as applied in their case, infringed the principle of proportionality, because its effects went beyond what was necessary to achieve its apparent purpose. This submission too was rejected.

Finally, the applicants drew attention to the reference in Article 1 to 'the general principles of international law' and argued that this meant that for all expropriations prompt, adequate and effective compensation was required. This raised another novel and important point. Does the Convention envisage two standards of compensation, one, the international law standard, applicable to foreigners, the other, the basic Convention standard, applicable to nationals; or does it, as the applicants maintained, allow the international law standard to be invoked by everyone? The Court decided that the former interpretation was correct. Since the international law standard was developed to protect non-nationals, it was natural to see the reference in Article 1 as intended to preserve that protection, rather than to extend it to nationals. This interpretation the Court found to be supported by both the *travaux préparatoires* and the consideration that differential treatment of nationals and non-nationals in the field of property law reform is the kind of discrimination which can readily be justified under Article 14. For all these reasons the Court concluded the general principles of international law are not applicable to a taking by a State of the property of its own nationals and consequently had no bearing on the present case.

The Court's treatment of various other articles relied on by the applicants may be described more briefly. Article 14 of the Convention provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The applicants claimed that the contested legislation was discriminatory on the ground of property because, first, it was a redistributive measure which applied only to a restricted class of property and, secondly, the lower the value of the property, the more harshly was the landlord treated. They therefore submitted that there was a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1. The Court decided that although Article 14 was applicable, it had not been violated. This was because, as already noted, the legislation had been found to have a legitimate aim and in view of the margin of appreciation, the difference of treatment complained of must be deemed to have an objective and reasonable justification.

So far as is relevant to the present case Article 6 (1) of the Convention provides:

In the determination of his civil rights and obligations . . . , everyone is entitled to a . . . hearing . . . by an independent and impartial tribunal established by law . . .

Here the applicants' complaint was that under the terms of the legislation the

reasonableness of each proposed enfranchisement was not susceptible to review by a court or tribunal, as, in their submission, Article 6 (1) required. This was a somewhat startling proposition and the Court had no hesitation in rejecting it. It pointed out that Article 6 (1) is essentially concerned with procedure and does not in itself guarantee any particular content for 'civil rights and obligations' in the substantive law of the Contracting States. In the present case 'in so far as the applicants may have considered that there was cause for alleging non-compliance with the leasehold reform legislation, they had unimpeded access to a tribunal competent to determine any such issue . . .'.¹³ Accordingly, there was no breach of Article 6 (1).

The last provision to be invoked was Article 13 which provides:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The applicants' claim here was that there was no domestic remedy in respect of their complaint that the leasehold reform legislation did not measure up to the standards of the Convention and its Protocols. Although this argument derived support from a number of recent cases,¹⁴ the Court rejected it on the ground that just as the Contracting States are under no obligation to incorporate the Convention into their domestic law, so Article 13 does not go so far as to require a State to permit its laws to be challenged before a national authority for alleged incompatibility with the Convention. The separate opinions reveal that this point was the subject of some disagreement within the Court. While four judges supported the conclusion, but considered that the judgment needed development,¹⁵ three considered that the broader reading of Article 13 should have been endorsed.¹⁶

This was the first of a number of cases involving Article 1 of Protocol No. 1 to be decided in the period under review.¹⁷ Although it is not the first case in which the scope of the right of property has been examined, it did, as already indicated, raise a number of important issues for the first time. The most difficult was perhaps the significance of the reference to the general principles of international law, an issue on which six members of the Court indicated that they wished to reserve their position.¹⁸ Finding the law is of course only one of the Court's tasks, and as the present case demonstrates, when the relevant principles have been established, applying them to the facts can be an elaborate exercise. In this regard it is no surprise to find the Court laying so much stress on the margin of appreciation, as property law is an area where States both have and must be allowed to maintain their own social policies.

¹³ Ibid., para. 81.

¹⁴ See *Silver and others*, Series A, No. 61, paras. 118, 119, *Campbell and Fell*, Series A, No. 80, para. 127, and *Abdulaziz, Cabales and Balkandali*, Series A, No. 94, para. 93.

¹⁵ See the concurring opinion of Judges Bindschedler-Robert, Gölcüklü, Matscher and Spielmann.

¹⁶ See the concurring opinions of Judges Pettiti, Russo and Pinheiro Farinha. The last indicated that he had voted for the judgment on this point because the contested legislation was compatible with the substantive provisions of the Convention and there was consequently no violation of Article 13.

¹⁷ For further discussion of Article 1 of Protocol No. 1 see *Van Marle* (Case No. 6), *Lithgow* (Case No. 7) and *AGOSI* (Case No. 13).

¹⁸ See the concurring opinion of Judges Bindschedler-Robert, Gölcüklü, Matscher, Pettiti, Russo and Spielmann.

Meaning of 'civil rights and obligations' in Article 6 (1)—application to proceedings concerning health and social security benefits—right to a 'fair' hearing (Article 6 (1))—right to a hearing within a 'reasonable' time (Article 6 (1))—just satisfaction (Article 50)

*Cases Nos. 3 and 4. Feldbrugge case;*¹⁹ *Deumeland case.*²⁰ In the first of these cases the Court held by a majority of 10 votes to 7 that the Netherlands had contravened Article 6 (1) of the Convention when proceedings brought by the applicant, who wished to continue to receive health insurance benefits, had not been attended by the guarantees of a fair trial. In the second case, which concerned proceedings in the Federal Republic of Germany to obtain a widow's supplementary pension, the Court held by a majority of 9 votes to 8 that there had been a violation of Article 6 (1) because the case was not heard within a reasonable time.

These cases originated in applications lodged with the European Commission in February 1979 by Mrs Feldbrugge, who was Dutch, and in April 1981 by Mr Deumeland, who was German. Mrs Feldbrugge's case arose out of proceedings before the Haarlem Appeals Board which had refused to continue a sickness allowance she was receiving and Mr Deumeland's out of proceedings instituted by his late mother before the German courts for a widow's supplementary pension. Both claims were based on violations of Article 6 (1). In its reports of May 1984 the Commission concluded that in neither case was that article applicable and by a narrow majority voted to reject the claims. It then referred both cases to the Court.

The relevant portion of Article 6 (1) of the Convention provides:

In the determination of his civil rights and obligations . . . everyone is entitled to a fair . . . hearing within a reasonable time . . .

The main issue in both cases was whether the relevant domestic proceedings were such as to involve a 'determination of . . . civil rights and obligations'. The Court had no doubt that in both cases there was a '*contestation*' (dispute) over a right. Thus here, unlike *Van Marle* (Case No. 6), this was not a point of difficulty. The crucial question was whether in each case the right in issue could be regarded as a 'civil right'.

In its previous case law²¹ the Court has held that the concept of 'civil rights and obligations' is an autonomous one and covers more than private law disputes in the traditional sense. It has also held that where no common European standard can be identified in the law of the Contracting States the juridical nature of the right in question must be sought by analysing the characteristics of the particular national system. Since this was the situation as regards the rights in issue here, which have not been examined previously, the Court considered how entitlement to health benefits is treated in the law of the Netherlands and how industrial accident insurance benefits are treated in the Federal Republic.

As regards the treatment of health benefits, the Court found features of both

¹⁹ ECHR, judgment of 29 May 1986, Series A, No. 99. This case was decided by the plenary Court.

²⁰ ECHR, judgment of 29 May 1986, Series A, No. 100. This case was also decided by the plenary Court.

²¹ See, e.g., the *Bentham* case, Series A, No. 97, and this *Year Book*, 56 (1985), p. 358; and earlier the *König* case, Series A, No. 27, and *ibid.*, 49 (1978), p. 317.

public and private law. The State set up and ran the health insurance scheme, but in itself this was not enough to make the right in question a matter of public law. The insurance in question was compulsory, but again this was not conclusive. Moreover, the State was clearly assuming here a responsibility for social protection, but while this implied an extension of the public law sphere, there were affinities with insurance which was traditionally a private law matter. Other features of private law were the personal and economic nature of the asserted right, which stemmed from the fact the applicant 'was not affected in her relations with the public authorities as such, acting in the exercise of discretionary powers, but in her personal capacity as a private individual. She suffered an interference with her means of subsistence and was claiming a right flowing from specific rules laid down by the legislation in force.'²² Furthermore, although the insurance provisions in question derived directly from statute, they were 'in a way grafted onto the contract. They thus formed one of the constituents of the relationship between employer and employee.'²³ Finally, there was the aforementioned close affinity with insurance under the ordinary law. Risk covering, management, the contributory system and the arrangements for payment were all similar and there were other parallels as well.

In the light of this analysis the Court concluded that the features of private law predominated over those of public law. None of the private law elements was decisive in itself, but taken together and cumulatively the Court was satisfied that they gave the asserted entitlement the character of a civil right for the purposes of Article 6 (1).

The reasoning and conclusion in the *Deumeland* case were virtually identical. Finding that the treatment of industrial accident insurance in the law of the Federal Republic exhibited the features of public and private law already mentioned, the Court again held that the latter predominated. Consequently here, as in the previous case, the right claimed by the applicant in the domestic proceedings fell within those protected by the Convention.

Having decided that Article 6 (1) was applicable, the Court's next task was to consider the applicants' specific claims. The basis of Mrs Feldbrugge's case was that the procedure before the Haarlem Appeals Board was not attended by the guarantees of a fair trial. Her particular objection was that she had been denied the opportunity of appearing either in person or through her lawyer to argue her case before the President of the Board. Moreover, the reports of two medical experts who had examined her had not been made available to her for comment or rebuttal, although these reports had provided the basis for the President's decision.

The Court decided that there had been no breach of the principle of equality of arms because the procedure adopted had placed Mrs Feldbrugge and her adversary, the relevant Occupational Association, under exactly the same disability. However, on account of these disabilities 'the procedure followed before the President of the Appeals Board by virtue of the Netherlands legislation was clearly not such as to allow proper participation of the contending parties, at any rate during the final and decisive stage of that procedure'.²⁴ Accordingly, the proceedings conducted before the President 'were not attended, to a sufficient degree, by one of the principal guarantees of a judicial procedure'.²⁴ Since the

²² *Feldbrugge* judgment, para. 37.

²³ *Ibid.*, para. 38.

²⁴ *Ibid.*, para. 44.

arrangements for challenging the President's decision did not enable this deficiency to be rectified, there had been a violation of Article 6 (1).

In the *Deumeland* case the applicant's main objection was not to the nature of the domestic proceedings but to their length.²⁵ The case begun by Mr Deumeland's mother started in the Berlin Social Court in June 1970 and ended in the Federal Constitutional Court in February 1981, a span of more than ten years. Applying the criteria laid down in its previous case law, the Court noted first that the case was not complex. The main issue was whether a fall suffered by the applicant's father, when returning home in the snow from an appointment with an ear, nose and throat specialist, qualified as an industrial accident. Though the case raised certain issues of fact, no difficult legal issue was involved. Then, with regard to the applicant's behaviour, the Court observed that he had taken steps which disclosed 'if not a wish to obstruct, at least an attitude of non-cooperation'²⁶ and these had slowed the proceedings. Finally, as far as the conduct of the judicial authorities was concerned, the Court concluded that at two stages in particular unwarranted delays had occurred. Taken together and cumulatively, these delays rendered the overall length of the proceedings unreasonable and failed to exhibit 'the particular diligence required in social security cases'.²⁷ There had accordingly been a breach of Article 6 (1).

On the question of just satisfaction under Article 50 the Court held that Mr Deumeland had failed to substantiate his claim for material damage and that even if his mother had suffered some psychological distress, there was no reason to award the applicant compensation for such damage. Since the applicant had made no claim for legal costs, the Court held that no award was called for under this head either and therefore concluded that the judgment itself was enough to satisfy the requirements of Article 50. In the *Feldbrugge* case, on the other hand, the Court found that the issue of just satisfaction was not yet ready for decision and unanimously decided to reserve this question for later consideration.

These cases are the latest in a series in which the Court has been called upon to decide the bearing of Article 6 on proceedings with a significant public law aspect. The Court's preference for treating this issue on a case by case basis, instead of trying to define 'civil rights and obligations' in the abstract, means that caution is required in assessing the implications of its latest decisions. It seems clear, however, that in deciding that the proceedings involved in the present cases fell within Article 6, the Court was again demonstrating its disposition to give the concept of 'civil rights and obligations' a broad interpretation. To the various judges who dissented this was going much too far.²⁸ In their view the development of procedural safeguards in areas not obviously within Article 6 is a legislative rather than a judicial task. That this view continues to attract substantial support indicates that this aspect of Article 6 (1) remains a highly controversial issue.

²⁵ The applicant's further claim that he had not been given a 'fair hearing' before an 'impartial tribunal' was dismissed by the Court for lack of evidence.

²⁶ *Deumeland* judgment, para. 80.

²⁷ *Ibid.*, para. 90.

²⁸ In both cases a substantial joint dissenting opinion was delivered by Judges Ryssdal, Bind-schedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt and Gersing. In the *Deumeland* case Judge Pinheiro Farinha delivered a short dissenting opinion and in the *Feldbrugge* case he made a brief concurring declaration.

Just satisfaction (Article 50)—compensation for pecuniary and non-pecuniary loss—costs and expenses

Case No. 5. Bönisch case (Application of Article 50).²⁹ The Court held unanimously that Austria should pay 700,000 Austrian schillings to the applicant as compensation for damage and 300,000 schillings, less 100,000 schillings already paid by the Government, for costs and expenses.

In its judgment on the merits in 1985 the Court held that the applicant had been denied a fair trial contrary to Article 6 (1) of the Convention because of the way in which, in criminal proceedings brought against him, the Austrian courts had dealt with the expert evidence of the Director of the Federal Food Control Institute.³⁰ The question of just satisfaction under Article 50 was reserved for later consideration.

In the present proceedings the applicant claimed over 34 million schillings as compensation for alleged financial loss caused by the impact of the criminal proceedings on his meat smoking business and an unspecified sum for non-pecuniary damage in the form of physical and mental suffering. The Government, on the other hand, pointed out that an effort had been made to make complete reparation by pardoning the applicant and removing his name from the criminal records, and also maintained that sums claimed by way of damages were excessive.

The Court agreed with the Commission that the evidence did not establish the necessary causal link between the deterioration in the applicant's financial situation and the violation of the Convention. It recognized, however, that it could not exclude 'the possibility that the applicant suffered, as a result of the potential effects of the violation found, a loss of opportunities of which account must be taken, even if the prospects of realising them were questionable'.³¹ There had also been non-pecuniary damage as a result of the prolonged uncertainty as to the repercussions of the criminal proceedings and the dominant role played by the Director which must have given the applicant a feeling of unequal treatment.

Neither the subsequent pardon, nor the European Court's decision on the merits, fully compensated for the above damage. Accordingly, the Court decided that financial compensation was required. Taking the pecuniary and non-pecuniary loss together, and assessing the matter on an equitable basis, the Court decided to award 700,000 schillings under this head.

Costs and expenses were also awarded to the applicant on a reduced basis. Here his claim was for more than 500,000 schillings which represented the costs of the proceedings in Austria and at Strasbourg. As to the former the Court pointed out that the applicant had not supplied vouchers and so it was difficult to decide which costs were incurred in seeking to prevent or redress the violation of the Convention. As regards the Strasbourg costs, the Court indicated that the sums were high, which raised doubts as to whether they were necessarily incurred or reasonable as to quantum. Although the Court repeated its warning that high fees 'may of themselves constitute a serious impediment to the effective

²⁹ ECHR, judgment of 2 June 1986, Series A, No. 103. The Court consisted of the following Chamber of Judges: Wiarda (President); Thór Vilhjálmsson, Bindschedler-Robert, Gölcüklü, Matscher, Walsh, Bernhardt (Judges).

³⁰ ECHR, judgment of 6 May 1985, Series A, No. 92, and see this *Year Book*, 56 (1985), p. 347.

³¹ Judgment, para. 11.

protection of human rights',³² it also took into account that the proceedings before the Strasbourg institutions had lasted for six years.

In all the circumstances the Court decided that the applicant was entitled to 300,000 schillings by way of reimbursement, less the 100,000 schillings already paid by the Government on account.

Meaning of 'contestation' in Article 6 (1)—right to peaceful enjoyment of 'possessions' (Article 1 of Protocol No. 1)

*Case No. 6. Van Marle and others case.*³³ In this case, which concerned the Netherlands, the Court held by 11 votes to 7 that a disagreement over the applicants' requests to be registered as certified accountants did not fall within Article 6 (1) of the Convention. As regards a claim in respect of the same matter based upon Article 1 of Protocol No. 1, the Court decided by 16 votes to 2 that the article was applicable, but held unanimously that it had not been violated.

The applicants in this case were all practising accountants who had requested registration as 'certified accountants' under the transitional provisions of legislation which was introduced in the Netherlands in 1972 to regulate this profession. After examining their work, the Board of Admission set up under the legislation rejected their applications. They then appealed to the Board of Appeal which interviewed them and made a further examination of their work. However, their appeals were rejected and so in 1979 they lodged applications with the Commission.

Their applications alleged violations of Article 6 (1), on the ground that they had been denied a fair and public hearing by an independent and impartial tribunal, and of Article 1 of Protocol No. 1, on the ground that they had suffered an interference with the peaceful enjoyment of their possessions. In its report of May 1984 the Commission expressed the opinion that Article 6 (1) was not applicable and that there had been no violation of Article 1 of Protocol No. 1. The Commission then referred the case to the Court.

The first question was whether Article 6 (1) was applicable to the type of proceedings here in issue. This depended on whether the proceedings before the Board of Appeal, which involved a disagreement about the applicants' professional competence and their claim to be registered as accountants, gave rise to a dispute ('*contestation*') over their 'civil rights and obligations'. As regards the existence of a dispute, the principles to emerge from the case law, said the Court, included the following:

- (a) conformity with the spirit of the Convention requires that the word 'dispute' should not be construed technically, but be given a substantive rather than a formal meaning;
- (b) the dispute must be genuine and of a serious nature;
- (c) the dispute may relate not only to the existence of a right but also to its scope or the manner in which it may be exercised;
- (d) the dispute may concern both questions of fact and questions of law.³⁴

³² Judgment, para. 15. This point has been made in a number of earlier cases; see, e.g., *Young, James and Webster*, Series A, No. 55, para. 15.

³³ ECHR, judgment of 26 June 1986, Series A, No. 101. This case was decided by the plenary Court.

³⁴ Judgment, para. 32. Principles (a), (c) and (d) were put forward in *Le Compte, Van Leuven and De Meyere*, Series A, No. 43; and principle (b) in *Sporrong and Lönnroth*, Series A, No. 52.

The Court then analysed the object of the disagreement which had here been submitted to the Board of Appeal. The latter's duties were to review the conduct of the Board of Admission's proceedings and to reconsider whether applicants met the legal requirements for registration. As regards the first of these tasks, ruling on matters such as whether a decision was arbitrary or *ultra vires*, or whether there had been procedural irregularities, involved making a judicial decision and so any disagreement could be regarded as a *contestation*. However, in the present case the applicants did not allege any such irregularity.

As regards the Board's second duty, that of reconsidering whether the applicants met the requirements for registration as accountants, they had similarly not relied on any points of law or fact susceptible to judicial assessment. In essence they were complaining of an incorrect assessment of their competence by the Board of Admission. In the Court's view, however,

An assessment of this kind, evaluating knowledge and experience for carrying on a profession under a particular title, is akin to a school or university examination and is so far removed from the exercise of the normal judicial function that the safeguards in Article 6 cannot be taken as covering resultant disagreements.³⁵

It followed that there was no '*contestation*' and so Article 6 (1) was not applicable in the present case. It was therefore also unnecessary for the Court to enquire whether the rights claimed by the applicants were 'civil rights', or whether the proceedings in issue complied with the Convention.

The other issue in this case, the alleged breach of Article 1 of Protocol No. 1, can be dealt with more briefly. Here also the primary question was one of applicability. The applicants alleged that as a result of the Board of Appeal's decisions, their income and the value of the goodwill of their accountancy business had diminished and that these losses engaged Article 1. The Government, on the other hand, considered that even if the case involved an acquired right—which they denied—any right to use the title 'accountant' could not be regarded as a 'possession' within the meaning of the Convention. On this point the Court agreed with the applicants and the Commission and held that:

... the right relied upon by the applicants may be likened to the right of property embodied in Article 1: by dint of their own work, the applicants had built up a clientèle; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1.³⁶

However, having held that Article 1 was applicable, the Court unanimously decided that there had been no violation. This was because the 1972 Act was designed to promote the 'general interest' by structuring a profession in which guarantees of competence were important and because it contained transitional provisions to enable practising accountants, like the applicants, to gain entry to the new profession on prescribed terms. In this way it struck a fair balance between the means and the aim, something which the Court has held is required if an interference with the peaceful enjoyment of possessions is to be justified.

The seven members of the Court who dissented on the issue of Article 6 considered that 'it was not merely a question of deliberating in the light of a proficiency examination relating to the conferment of a diploma but of deciding

³⁵ Judgment, para. 36.

³⁶ *Ibid.*, para. 41.

whether or not a professional practice carried on over many years by the applicants to the satisfaction of their clients who had entered into contracts with them should continue as before'.³⁷ Or, as Judge Cremona put it: 'What was in fact at issue was the continued effective exercise by the applicants of their accountancy profession under the title of accountant, which they had in fact used for several years and was now denied to them. . . .' In the dissenters' view this was enough to raise a *contestation*, while the Court's approach, which treated certain issues before the Board of Appeals as justiciable and others as non-justiciable, was unsustainable.

Whether the Judgment or the dissenting opinions offer the better reading of the Convention, or reflect more accurately the principles to be found in the Court's recent case law,³⁸ are questions on which views will differ. It is worth noting, however, that of the eleven judges in the majority on the issue of applicability, three voted for the judgment on the ground that there *was* a dispute, but in their view it did not concern a 'civil right'.³⁹ The dissenting judges, however, were agreed that the dispute which they had identified did concern a civil right. Thus if this latter aspect of Article 6 had been the crucial issue, it seems likely that the Court would have been as divided as it was over the same question in *Feldbrugge* (Case No. 3) and *Deumeland* (Case No. 4).

The only point on which the Court was unanimous was its ruling that there was no violation of Article 1 of Protocol No. 1. This, of course, reflects the latitude which States enjoy under this provision and which has already been noted.⁴⁰ On account of this latitude the Court's wide interpretation of the concept of 'possessions', though new, is likely to be less significant than it might appear. Nevertheless, it is worth pondering on whether such a broad reading of the Convention is really justified. The judges who dissented on the question of the applicability of Article 1 objected to the use of a provision which was intended to protect property in a situation which concerned the regulation of a professional activity. They also pointed out that 'a wide variety of legislative and other measures can affect incidentally the scope, profitability and therefore the "goodwill" value of a business'⁴¹ and questioned whether an interpretation which brings such measures within the scope of Article 1 can be reconciled with the object and purpose of the Convention.

Right of property (Article 1 of Protocol No. 1)—the meaning of 'in the public interest' and the reference to 'the general principles of international law' in Article 1 of Protocol No. 1—the standard of compensation in cases of nationalization—freedom from discrimination (Article 14)—right of access to the courts and to trial within a reasonable time (Article 6 (1))—right to an effective remedy before a national authority (Article 13)

³⁷ Joint dissenting opinion of Judges Thór Vilhjálmsson, Pettiti, Macdonald, Russo, Gersing and Spielmann.

³⁸ In addition to those mentioned above, see the *Bentham* case, Series A, No. 97, and this *Year Book*, 56 (1985), p. 358.

³⁹ See the joint concurring opinion of Judges Ryssdal, Matscher and Bernhardt.

⁴⁰ See *James* (Case No. 2).

⁴¹ See the joint dissenting opinion of Judges Sir Vincent Evans and Gersing on the applicability of Article 1 of Protocol No. 1.

*Case No. 7. Lithgow and others case.*⁴² The Court held that the nationalization of the applicants' interests under the Aircraft and Shipbuilding Industries Act 1977 did not give rise to any violation of the Convention, or Protocol No. 1 thereto, on the part of the UK. Specifically, the Court rejected by 13 votes to 5 and 17 votes to 1 claims by the applicants that they had been victims of breaches of Article 1 of Protocol No. 1 on account of the inadequacy of the compensation received, and unanimously rejected claims that they had been victims of a breach of Article 14 of the Convention, taken in conjunction with the said Article 1. The Court also held by 14 votes to 4 that there had been no violation of Article 6 (1) on the ground that one applicant had no individual access to an independent tribunal in the determination of his rights to compensation, and by 16 votes to 2 that there had been no violation of Article 6 (1) on any of a number of other grounds advanced by the applicants. Finally, the Court held by 15 votes to 3 that there had been no violation of Article 13 of the Convention.

The applicants in this case were all companies or individuals whose interests had been taken into public ownership by the Aircraft and Shipbuilding Industries Act 1977. In applications lodged with the Commission at various dates between 1977 and 1981 they complained that the arrangements for compensation contained in the Act violated the Convention and Article 1 of Protocol No. 1. In its report of March 1984 the Commission expressed the opinion that there had been no violation of any of the articles complained of and subsequently referred the case to the Court.

This case is discussed in detail in Professor Mendelson's article elsewhere in this *Year Book*.⁴³ It is therefore unnecessary to comment further on it here, except to note that much of the judgment traverses ground already covered in the *James* case (Case No. 2), but this is the first case in which the conditions for pursuing a policy of nationalization, and in particular the requirements as regards compensation, have been examined. In this connection the Court's ruling that the standard of compensation under general international law is not relevant to situations in which a Contracting State expropriates the property of its own nationals is particularly thought-provoking. For the Convention standards to be applied under Protocol No. 1, Article 1, are either higher than (or at least equivalent to) or lower than the standards of customary international law. The assumption generally made has been that Convention standards are higher than the so-called 'minimum standards' which form the basis of the traditional law of State responsibility towards aliens. Indeed, the proposition that, under the Convention, member States may treat their own nationals worse than international law allows them to treat aliens would seem almost shocking.

Yet, if that is true, it will not be surprising to find in the future that international tribunals turn to these cases to see what the European standard is, and conclude that member States cannot expect non-member States of the Third World to apply higher standards to the expropriation of the property of Europeans.

Freedom of expression (Article 10)—application to comment in the Press likely to harm a politician's reputation—the meaning of 'necessary in a democratic society' in Article 10 (2)—just satisfaction (Article 50)

⁴² ECHR, judgment of 8 July 1986, Series A, No. 102. This case was decided by the plenary Court.

⁴³ See p. 33, above.

*Case No. 8. Lingens case.*⁴⁴ In this case, which concerned Austria, the Court held unanimously that the imposition of a fine for defamation in the Press was not consistent with the applicant's right to freedom of expression and therefore violated Article 10 of the Convention. The applicant was awarded a total of 284,536.60 Austrian schillings under various heads by way of just satisfaction.

In 1975 the applicant, who was a journalist and editor of the Vienna magazine *Profil*, published two articles strongly criticizing Mr Bruno Kreisky, the Austrian Chancellor. The criticisms were of the latter's accommodating attitude towards P, the President of the Austrian Liberal Party, who had served in an SS infantry brigade during the war, and for his attacks on Mr Simon Wiesenthal, President of the Jewish Documentation Centre, who had publicly denounced P. Publication of the articles prompted Mr Kreisky to bring a private prosecution against the applicant for defamation in the Press. In 1979 the Vienna Regional Court partially upheld the complaint and sentenced Mr Lingens to a fine of 20,000 schillings. In 1981, as a result of further proceedings, this fine was reduced by the Court of Appeal to 15,000 schillings.

In his application to the Commission in 1983 Mr Lingens claimed that he had been the victim of a breach of Article 10. In its report in October 1984 the Commission unanimously upheld this complaint and subsequently referred the case to the Court.

Article 10 of the Convention provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others . . .

It was clear that the applicant's conviction by the Austrian courts constituted an 'interference by public authority' with his freedom of expression. Accordingly, the main issue in the case was whether that conviction could be justified under Article 10 (2). Since the Court was satisfied that the restriction imposed here was 'prescribed by law', the question was whether it was 'necessary in a democratic society . . . for the protection of the reputation . . . of others'.

The Government submitted that though freedom of expression is important, domestic courts have a duty to ensure that political debate does not degenerate into personal insult. In this connection they pointed out that the articles had used strong language. Moreover, although a penalty was imposed, there had been no prior censorship. The applicant, on the other hand, emphasized what he saw as the responsibilities of a political journalist in a pluralist society and stated that a politician must expect to be criticized.

In accordance with its usual practice in cases involving an attempt to justify interference with a Convention right, the Court began its evaluation of the arguments by recalling the principles laid down in its earlier jurisprudence.⁴⁵

⁴⁴ ECHR, judgment of 8 July 1986, Series A, No. 103. The case was decided by the plenary Court.

⁴⁵ The scope and application of Article 10 were most recently considered in the *Barthold* case, Series A, No. 90, and this *Year Book*, 56 (1985), p. 341; and earlier in the *Sunday Times* case,

Thus the Court has indicated that 'necessary' implies the existence of a 'pressing social need', and has emphasized that the respondent's margin of appreciation in this matter is subject to the Court's supervision. It is also clear that the case must be looked at as a whole, taking account of the context and bearing in mind that to be justified any interference must be proportionate to the aim pursued. Furthermore, as the Court recalled, in a democratic society freedom of expression 'is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb'.⁴⁶

The Court then considered how all of the above relates to Press criticism of individuals. As regards the Press generally, the Court emphasized that the principles involved have significant implications:

These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, *inter alia*, for the 'protection of the reputation of others', it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them . . . In this connection, the Court cannot accept the opinion, expressed in the judgment of the Vienna Court of Appeal, to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader . . .⁴⁶

The protection to be afforded to politicians the Court saw as a matter directly related to the function of press freedom. As the Court put it:

Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 enables the reputation of others—that is to say, of all individuals—to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.⁴⁷

Turning to the particular facts, the Court explained that the articles in question dealt with political issues of public interest in Austria. Their content and tone were fairly balanced, though their language was likely to harm Mr Kreisky's reputation. However, since the case involved a politician, account must also be taken of the fact that the articles were written in a period of controversy following an election. The Court regarded the penalty imposed on the applicant as a kind of censure which would be likely to discourage him from making such criticisms again. Therefore although the disputed articles had in fact been widely disseminated, the sanction was still liable 'to hamper the press in performing its task as purveyor of information and public watchdog'.⁴⁸

Series A, No. 30, and *ibid.* 50 (1979), p. 257, and the *Handyside* case, Series A, No. 24, and *ibid.* 48 (1976-7), p. 381.

⁴⁶ Judgment, para. 41.

⁴⁷ *Ibid.*, para. 42.

⁴⁸ *Ibid.*, para. 44.

When the Austrian courts had examined the applicant's case they had, in accordance with the relevant law, considered whether he had established the truth of the defamatory statements. Unfortunately, as the Court pointed out, the particular statements complained of were all value-judgments and consequently incapable of proof. It was thus impossible for Mr Lingens to make out his defence, a situation which, said the Court, infringed 'freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention'.⁴⁹ In all the circumstances, therefore, the interference with the applicant's freedom of expression was disproportionate to the legitimate aim pursued. Accordingly, the Court held that there had been a breach of Article 10.

The final issue was the question of just satisfaction under Article 50, which the Court found was ready for decision. The applicant's first claim, which was uncontested, was for the repayment of the fine and the costs which the Austrian court had awarded against him. He also claimed the cost of publishing the domestic judgment in the magazine (which was part of the penalty) and the consequent loss of advertising revenue. The latter was disputed by the Government, but the Court, holding that the applicant might have suffered some 'loss of opportunity' thereby, held that this should be taken into account. As far as other costs and expenses were concerned, it decided that the applicant was entitled to recover his defence costs in their entirety, together with his travel and subsistence costs for the Strasbourg proceedings. However, the Court agreed with the Government that the corresponding claim for legal expenses was excessive and reduced the sum awarded under this head by about one-third.

Although the Court has had several important cases on Article 10, this is the first in which the scope of political comment, and specifically the steps which may be taken to protect a politician's reputation, have been considered. The Court's emphatic endorsement of Press freedom is also to be found in its earlier jurisprudence and here, quite rightly, was the dominant consideration. It might be otherwise, of course, in a case involving allegations or comments about a politician's private life,⁵⁰ or remarks which were merely abusive and unrelated to the political situation. In pointing out the importance of the distinction between facts and value-judgments the Court seemed to be suggesting that what Austrian law really needs is a defence of fair comment. The law of torts demonstrates that deciding where facts ends and comment begins presents its own problems. The value of this distinction in protecting the right to criticize is, however, plainly demonstrated by the present case.

Freedom of expression (Article 10)—relevance to employment as a civil servant

*Cases Nos. 9 and 10. Glasenapp case;*⁵¹ *Kosiek case.*⁵² In these cases, which concerned the Federal Republic of Germany, the Court held by 16 votes to 1 that

⁴⁹ Judgment, para. 46.

⁵⁰ In the present case the Court noted that the offending words related to Mr Kreisky's public condemnations of Mr Wiesenthal and to the former's attitude as a politician towards National Socialism. In view of this it concluded that there was 'no need in this instance to read Article 10 in the light of Article 8': judgment, para. 38.

⁵¹ ECHR, judgment of 28 August 1986, Series A, No. 104. This case was decided by the plenary Court.

⁵² ECHR, judgment of 28 August 1986, Series A, No. 105. This case was also decided by the plenary Court.

the authorities' refusal to continue the applicants' employment on the grounds of lack of allegiance to the Constitution, as evidenced by their public statements, did not constitute an interference with their right to freedom of expression, as guaranteed by Article 10.

The applicants in these cases were teachers who had been dismissed when the authorities in the Federal Republic became aware of their political views. Mrs Glasenapp was an art teacher who had expressed support for the policies of the West German Communist Party, the KPD. Mr Kosiek, on the other hand, was a physics lecturer who was a leading supporter of an extreme right wing party, the National Democratic Party of Germany, the NPD. In Germany teachers have the status of civil servants and are required to sign a declaration of loyalty to the Constitution. Mrs Glasenapp had done so, but then had a letter published in the KPD's paper, *Red Flag*, in which she indicated her sympathy with the Party's policy. When asked by the authorities to dissociate herself from the KPD she refused, whereupon her appointment as a teacher was revoked for 'wilful deceit'. Mr Kosiek, for his part, was dismissed on the grounds that he lacked the necessary qualification for his technical college post, the authorities taking the view that in expressing approval of the NPD's objectives by his conduct and in two books he had written, he had demonstrated that he did not support the free democratic system as embodied in the Federal Constitution.

Following unsuccessful attempts to secure reinstatement through the West German courts, both applicants lodged applications with the Commission in which they alleged that their dismissals were contrary to Article 10. In its reports of May 1984 the Commission concluded by 9 votes to 8 that there had been a violation in Mrs Glasenapp's case, but by 10 votes to 7 that there had been no violation as regards Mr Kosiek. The Commission then referred both cases to the Court.

The main issue in both cases was whether Article 10 has any application in situations of this kind.⁵³ Unlike *Lingens* (Case No. 8), there had been no direct interference with freedom of expression in the sense of a prohibition or attempted restraint. On the other hand, what the applicants had written was clearly instrumental in losing them their jobs. The Government argued that the applicants were claiming a right that was not secured in the Convention, namely access to the Civil Service, and that consequently their cases were not really concerned with freedom of expression. The Court decided that this raised an important question of interpretation which could not, as the Government had suggested, be treated as a preliminary objection. Examining the issue on the merits, however, the Court agreed with the Government and ruled that both cases fell outside Article 10.

To justify its conclusion the Court, whose reasoning was identical in both cases, began by explaining that the Convention, unlike the corresponding United Nations instruments, does not guarantee a right of access to the Civil Service, and this omission is by no means accidental:

The Universal Declaration of Human Rights of 10 December 1948 and the International Covenant on Civil and Political Rights of 16 December 1966 provide, respectively, that 'everyone has the right of equal access to public service in his country' (Article

⁵³ A preliminary objection by the Government that Mrs Glasenapp had failed to exhaust her domestic remedies was briefly considered and rejected.

21 para. 2) and that 'every citizen shall have the right and the opportunity . . . to have access, on general terms of equality, to public service in his country' (Article 25). In contrast, neither the European Convention nor any of its Protocols sets forth any such right. Moreover, as the Government rightly pointed out, the signatory States deliberately did not include such a right: the drafting history of Protocols Nos. 4 and 7 shows this unequivocally. In particular, the initial versions of Protocol No. 7 contained a provision similar to Article 21 para. 2 of the Universal Declaration and Article 25 of the International Covenant; this clause was subsequently deleted. This is not therefore a chance omission from the European instruments; as the Preamble to the Convention states, they are designed to ensure the collective enforcement of 'certain' of the rights stated in the Universal Declaration.⁵⁴

Of course, it does not follow from this that in other respects civil servants fall outside the Convention. Like everyone else, they are fully entitled to its protection, including that afforded by Article 10. To determine whether the applicants' freedom of expression had been infringed it was therefore necessary for the Court to decide whether their dismissals amounted to an interference with that right. Noting first that the local law required the applicants to guarantee that they would uphold the free democratic constitutional system, the Court stated that this requirement 'applies to recruitment to the civil service, a matter that was deliberately omitted from the Convention, and it cannot in itself be considered incompatible with the Convention'.⁵⁵

The Court then decided that on the facts in both cases 'access to the civil service lies at the heart of the issue submitted to the Court'.⁵⁶ In refusing the applicants such access the authorities took account of their opinions and attitude merely to determine whether they possessed one of the necessary qualifications for the posts in question. It followed that there had been no interference with the exercise of the right protected by the Convention.

Instead of deciding that there had been no interference with the right protected by Article 10 (1), the Court could have decided that the applicants' freedom of expression had been interfered with, but that in the circumstances such interference was justified under Article 10 (2). This was the approach preferred by Judge Cremona, who in his concurring opinions observed that: 'To say, as is done in the judgment, that in dismissing the applicant the relevant authority merely took account of [the applicant's] opinions is an understatement . . . the whole decision was based upon them. . . . as in a picture, civil service status provides no more than the general background, whereas the dominant feature in the foreground is a prejudice suffered because of the holding and expression of opinions'. For Judge Spielmann, on the other hand, the lone dissenter, there had been an interference with the applicants' rights for which Article 10 (2) provided no justification.

That two members of the Court were able to reach opposite conclusions over the application of Article 10 (2) is in no way surprising and may shed further light on the majority's thinking. For as six judges pointed out in a concurring opinion:

The reason why the Contracting States did not want the right of access to the civil service to be secured in the Convention or its Protocols (and it must be stressed that this was no chance omission but a deliberate one) lies in the great difficulty of bringing before an international court the problem of recruitment and the arrangements for selection and

⁵⁴ *Glasenapp* judgment, para. 48.

⁵⁵ *Ibid.*, para. 52.

⁵⁶ *Ibid.*, para. 53.

access, which by their very nature differ considerably in Council of Europe member States according to national tradition and the system governing the civil service.⁵⁷

Thus, by deciding that the present cases were essentially concerned with access to the Civil Service rather than with freedom of expression, the Court was able to confine the Convention to its intended sphere of application and at the same time avoid having to decide how far political views ought to be taken into account in determining an individual's suitability for the Civil Service.

Right to respect for private life (Article 8)—application to civil status of transsexual—right to marry (Article 12)

*Case No. 11. Rees case.*⁵⁸ By 12 votes to 3 the Court rejected a claim by the applicant, a transsexual, that he was a victim of national legislation and practices contrary to his right to respect for his private life, as guaranteed by Article 8 of the Convention. The Court also unanimously rejected the applicant's claim that because English law made it impossible for him to enter into a valid marriage with a woman, there had been a violation of his right to marry contrary to Article 12.

The applicant was a transsexual who, having been born in 1942 with all the physical and biological characteristics of a female, underwent a sexual conversion in 1970 and became socially accepted as a male. In 1977 he changed his name to Mark Nicholas Alban Rees. Except for his birth certificate, all his official documents refer to him by his new name and use the prefix 'Mr', where relevant. However, his application to have the birth register changed so as to reflect his new sexual identity was rejected by the Registrar General.

In his application to the Commission in 1979 Mr Rees complained that under the law of the UK he did not have a legal status corresponding to his actual condition and that this violated his right to respect for his private life, as guaranteed by Article 8, and his right to marry and found a family, as guaranteed by Article 12. In its report in December 1984 the Commission expressed the unanimous opinion that there had been a breach of Article 8, but not of Article 12. The Commission then referred the case to the Court.

The applicant's main claim in this case was based on Article 8 of the Convention, which provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In previous cases on this article it has been established that in addition to its duty to refrain from action which would constitute an interference with this right, each Contracting State is also under an obligation to take positive measures

⁵⁷ Joint concurring opinion of Judges Bindschedler-Robert, Pinheiro Farinha, Pettiti, Walsh, Russo and Bernhardt.

⁵⁸ ECHR, judgment of 17 October 1986, Series A, No. 106. This case was decided by the plenary Court.

to ensure that the right is effectively respected.⁵⁹ The question of what positive obligations, if any, there are in a given situation, is, of course, for the Strasbourg institutions to decide and this was the crucial issue in the present case.

In deciding whether any positive obligation should be recognized the Court generally attaches considerable importance to the treatment of the matter concerned in the law of the Contracting States, and in particular the extent to which those laws exhibit a common approach. This was its starting-point in the present case. Finding that transsexualism is an issue on which there are wide variations of approach, the Court held that as a result this is a matter on which the parties to the Convention enjoy a wide margin of appreciation. It was therefore against this background that the Court next turned to the facts to consider whether English law could be regarded as striking a fair balance between the interests of the individual and the general interest of the community, as indicated by the factors set out in Article 8 (2).

The Court noted that by the various measures which had been taken to acknowledge the applicant's change of sex, the UK had endeavoured to meet his demands, as far as this was possible under a system in which a birth certificate is simply a record of historical fact and there is no provision for documents officially certifying civil status. One way of satisfying the applicant's requirements would be for the UK to introduce such documents, that is, a new type of certificate indicating and constituting proof of a person's current status. Although this would certainly allow recognition of the applicant's status as a male, the Court held that so drastic an innovation could not be said to reflect a fair balance between the interests involved. Such a document had not been considered necessary in the UK hitherto and if introduced, in addition to important administrative consequences, would impose new duties on the rest of the population.

A less radical alternative would be to have the birth register adjusted in such a way as to record the applicant as male, while retaining a secret note of the original entry. However, the Court held that this expedient could not be justified as a way of striking the requisite balance either. For it would involve difficult problems on many matters of public interest. For example, it would complicate factual issues arising in family law and the law of succession and would require detailed legislation dealing with the effect of the change to the register in various contexts and in particular with the circumstances in which secrecy should yield to considerations of the public interest.

The Court therefore concluded that there was no breach of Article 8 in the circumstances of the present case. It added, however:

That being so, it must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances . . . The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.⁶⁰

There remained the applicant's claim under Article 12, which provides:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

⁵⁹ For a recent example, see *X and Y v. Netherlands*, Series A, No. 91, and this *Year Book*, 56 (1985), p. 344.

⁶⁰ Judgment, para. 47.

In English law marriage is defined as a voluntary union for life of one man and one woman to the exclusion of all others and it is clear that a marriage between a transsexual and a person of the transsexual's former sex is not valid.⁶¹ Thus the applicant in the present case, though socially a man, was unable to marry a woman. In the Court's view, however, this did not involve an infringement of Article 12. Holding that 'the right to marry' refers to traditional marriage between persons of opposite biological sex, the Court added that limitations on the right must not restrict or reduce it in such a way or to such an extent that its very existence is impaired. In the present case, however, the Court held that the legal impediments in the UK to the marriage of persons who are not of the opposite biological sex could not be said to have an effect of this kind. Accordingly, there had been no violation of Article 12.

This is the first case in which the Court has considered the scope of the right to marry. Although the possibility of transsexuals' marrying a person of their former sex is recognized in several States of the Council of Europe,⁶² it is not surprising that the Court, whose view on this point had support in the Commission, decided that a traditional approach to this issue is permitted by the Convention.

The ruling on Article 8 is likely to be more contentious. In 1980 the Court was faced with the same issue in the *Van Oosterwijck* case,⁶³ but was able to avoid a decision by finding that the applicant had failed to exhaust his domestic remedies. In the present case, however, it was obliged to grasp the nettle. Although the Court arrived at its decision by a large majority, the Commission, as already noted, unanimously reached the opposite conclusion. As in other cases concerned with positive obligations, the key issue here seems to be the margin of appreciation. In the absence of any consensus as to how the delicate problem of transsexualism should be dealt with, the treatment of this subject in English law does not appear obviously unreasonable. However, the Court's indication of its awareness of current developments and its frequently reiterated intention to interpret the Convention as a 'living instrument' make this a matter on which there should be no room for complacency.

Right to take proceedings to challenge the lawfulness of detention (Article 5 (4))—right to have this issue decided 'speedily' (Article 5 (4))—just satisfaction (Article 50)

*Case No. 12. Sanchez-Reisse case.*⁶⁴ In this case, which concerned proceedings for provisional release from custody, the Court decided that Switzerland had violated Article 5 (4) of the Convention, because the necessary requirements of procedure and speed had not been complied with in the applicant's case. It also decided that the respondent State was to pay the applicant the sum of 6,868 Swiss francs in respect of his costs and expenses.

⁶¹ See *Corbett v. Corbett*, [1970] 2 WLR 1306.

⁶² See the Report of the Commission of 12 December 1984, para. 44.

⁶³ ECHR, judgment of 6 November 1980, Series A, No. 40, and this *Year Book*, 51 (1980), p. 339.

⁶⁴ ECHR, judgment of 21 October 1986, Series A, No. 107. The Court consisted of the following Chamber of Judges: Ganshof van der Meersch (President); Bindschedler-Robert, Lagergren, Pinheiro Farinha, Walsh, Russo, Bernhardt (Judges).

The applicant, who was an Argentine national, was arrested in Switzerland in March 1981 with a view to his extradition to Argentina, where he was wanted for the kidnapping and unlawful detention of persons whom he had held to ransom. The Federal Court subsequently accepted his objection to extradition and decided that he should be tried in Switzerland. Meanwhile, on three occasions Mr Sanchez-Reisse had applied to the Federal Police Office for provisional release from detention. His first request was withdrawn. His second request, made in January 1982, was rejected by the Federal Court in February, following the negative opinion given by the Office, and his third request, made in May 1982, was rejected by the Court in July.

In his application to the Commission in May 1982 the applicant claimed that the way his case had been dealt with involved violations of Article 5 (4) of the Convention. In its report in December 1984 the Commission expressed the unanimous opinion that this provision had been violated. The Commission then referred the case to the Court.

This case was entirely concerned with Article 5 (4) of the Convention, which provides:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The applicant's objection to the procedure followed in his case was based on a number of features of Swiss law which the Court examined in turn. His first objection was that he had been denied direct access to a Court because all requests for provisional release had to go through the Federal Police Office. The latter examined the request and gave an opinion on it before passing it on to the Federal Court. Legally, however, as the European Court pointed out, the request was addressed to the Federal Court and the intervention of the Federal Police Office did not impede access to the Federal Court, or limit its power of review. Moreover, the European Court considered that as extradition is an issue affecting international relations, it was understandable that the executive should wish to have an opportunity to express its views. Thus the participation of the Federal Police Office reflected a legitimate concern. This complaint was therefore dismissed.

The applicant's next point was that in the proceedings in the Federal Court he had no opportunity to conduct his own defence. This also was rejected. It had no basis in the text of Article 5 (4). Moreover, Swiss law required a lawyer to be provided in cases of this kind, and as the Court pointed out, this afforded an important guarantee to everyone involved in extradition proceedings.

The last argument was that the applicant had not been provided with the benefits of an adversarial procedure which the Court in its previous jurisprudence has held to be an essential element in proceedings under Article 5 (4).⁶⁵ Here the Court agreed with the applicant on the ground that he had been denied an opportunity to submit written comments on the Federal Police Office's opinion, which would have been one means of satisfying this requirement, and was also unable to appear in person before the Federal Court, which would have been an alternative. The Court therefore concluded that the procedure followed,

⁶⁵ See, e.g., the *Vagrancy* cases, Series A, No. 12, and this *Year Book*, 46 (1972-3), p. 463, and more recently the *Winterwerp* case, Series A, No. 33, and *ibid.* 50 (1979), p. 267.

when viewed as a whole, did not fully comply with guarantees required by Article 5 (4).

On the question of whether the proceedings had been conducted 'speedily' the Court held that as regards the two requests in issue, the time to be taken into consideration ran from the initial submissions to the Federal Police Office for provisional release, to the rejection of the applicant's requests by the Federal Court, a total period of thirty-one days in one instance and forty-six days in the other. Pointing out that 'speedily' could not be defined in the abstract, but must be interpreted in the light of the particular circumstances,⁶⁶ the Court explained that in the present case the question of extradition provided the background to the applicant's requests for release and necessarily influenced the treatment of the case by the Federal Police Office and the Federal Court. Moreover, whenever a request for extradition did not at the outset seem unacceptable, detention was the rule and release the exception. Nevertheless, in the Court's view balancing the risks of maintaining the applicant's detention against those of releasing him was not a complex problem, especially having regard to the fact that the extradition case-file had been under examination for about a year. The decisions on provisional release therefore could not be said to have been taken 'speedily' and there was accordingly also a violation of this requirement in the Convention.

The applicant's claim for just satisfaction under Article 50 concerned only his lawyer's fees and travel and hotel expenses. As this satisfied the conditions laid down in the Court's case law, the claim was accepted in full.⁶⁷

Right of property (Article 1 of Protocol No. 1)—the meaning of 'in accordance with the general interest' in Article 1 of Protocol No. 1—the margin of appreciation—the scope of Article 6 (1) as regards criminal proceedings against third parties

*Case No. 13. AGOSI case.*⁶⁸ In this case, which involved the UK, the Court held by 6 votes to 1 that the seizure of property belonging to the applicant by the customs authorities and the subsequent forfeiture of that property did not involve a violation of Article 1 of Protocol No. 1. The Court also held by 6 votes to 1 that Article 6 of the Convention did not apply in the present case in so far as it relates to the determination of a criminal charge and by 5 votes to 2 that it was unnecessary to take the same article into account in so far as it relates to the determination of civil rights and obligations.

The applicant, Allgemeine Gold und Silberscheideanstalt AG (AGOSI), was a West German joint stock company which sold 1,500 gold coins, worth £120,000, to two individuals, X and Y, who paid for them by cheque. The cheque was dishonoured which meant that according to both the contract of sale and West German law, AGOSI remained owner of the coins. X and Y tried to smuggle the coins into the UK—according to AGOSI without its knowledge—

⁶⁶ For recent cases on this issue, see *Luberti*, Series A, No. 75, and this *Year Book*, 55 (1984), p. 374, and *de Jong, Baljet and van den Brink*, Series A, No. 77, and *ibid.*, p. 377.

⁶⁷ This issue was decided by 6 votes to 1. The findings that Article 5 (4) had been violated as regards procedural guarantees and the failure to take decisions speedily, were arrived at by 5 votes to 2 and 6 votes to 1, respectively.

⁶⁸ ECHR, judgment of 24 October 1986, Series A, No. 108. The Court consisted of the following Chamber of Judges: Wiarda (President); Ryssdal, Thór Vilhjálmsson, Matscher, Pinheiro Farinha, Pettiti, Sir Vincent Evans (Judges).

but were discovered and the coins were seized by the Customs and Excise. AGOSI claimed that it was entitled to the return of the coins, as it was innocent of any smuggling offence. However, the Commissioners of Customs and Excise rejected the claim and refused to exercise their statutory discretion to restore the seized goods. In civil proceedings necessitated by AGOSI's refusal to accept the seizure as lawful, the English courts also rejected the claim.

In its application to the Commission in September 1980 AGOSI claimed that it had been the victim of a violation of Article 1 of Protocol No. 1 and Article 6 (1) of the Convention. In its report of October 1984 the Commission concluded that there had been no breach of either of those articles. The Commission then referred the case to the Court.

It will be recalled that Article 1 of Protocol No. 1, which has been quoted in Case No. 2, contains two paragraphs. The first protects the peaceful enjoyment of possessions and prohibits deprivation of possessions except under defined circumstances. The second then goes on to preserve 'the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'. The first question to be resolved in the present case was which of the two paragraphs was applicable.

The Court decided that although the forfeiture of the smuggled coins involved a deprivation of property, which pointed to the first paragraph, the prohibition on importation was clearly a control of the use of property which fell under the second paragraph. Since the deprivation of property which was involved here was a constituent part of the procedure for the control of the use of gold coins in the UK, the Court concluded that the case must be considered under the second paragraph.

To determine whether the respondent's conduct could be justified under Article 1, the Court ruled that the crucial question was whether the enforcement of the prohibition on importation struck a fair balance between the demands of the general interest and the interest of the individual concerned. This depended on many factors, including the behaviour of the owner of the property and in particular his degree of culpability. Emphasizing that the State enjoys a wide margin of appreciation in deciding how the appropriate balance is to be struck, the Court also explained that it proposed to take a comprehensive view of the applicable procedures.

Turning to the position under English law specifically, the Court noted that the question of AGOSI's behaviour had not been a relevant factor in the condemnation proceeding in the English courts. It had, however, been raised before the Commissioners of Customs and Excise in the subsequent administrative proceedings for the restoration of the coins. Under English law the Commissioners were bound to be guided by all relevant considerations, including AGOSI's alleged innocence and the bearing of its behaviour on the breach of the importation provisions. Moreover, the Commissioners' exercise of their discretion could be challenged by judicial review if a claimant wished to maintain that they had failed to take relevant considerations into account.

In the light of the above the Court concluded that English law had not failed either to ensure that reasonable account could be taken of the behaviour of AGOSI, or to afford it a reasonable opportunity to put its case. The applicant company, for reasons of its own, had not chosen to seek judicial review of the

Commissioners' decision. However, this could not, the Court held, affect its conclusion. There was accordingly no breach of Article 1 of Protocol No. 1.

The applicant's other claim in this case concerned Article 6, and in particular the relevance of the procedural safeguards contained in that provision to the proceedings here in issue. Article 6 is applicable to proceedings involving the determination of 'civil rights and obligations', or of a 'criminal charge'. As far as the latter was concerned, the Court held that although AGOSI's property rights had been adversely affected by measures which were the result of an act for which the smugglers were prosecuted, it did not follow that the proceedings which formed the subject of the present case were concerned with the determination of a 'criminal charge' against AGOSI. Article 6 was therefore not applicable on this basis. On the other hand, the applicant had not invoked Article 6 in so far as it concerned 'civil rights and obligations' and the Court held that it was not necessary to examine this issue on its motion. There was therefore no ground for examining the case under Article 6 on this basis either.

Unlike *James* (Case No. 2) and *Lithgow* (Case No. 7) the Court was not here concerned with the deprivation of possessions in 'the public interest', but with control of the use of property in 'the general interest'. Although this meant that a different aspect of Article 1 was in issue and the facts of the present case were, of course, also very different, the Court followed essentially the same approach in all three cases. The emphasis throughout is on balancing the individual's protection against the general interest, a process in which the Court is clearly prepared to grant governments the wide margin of appreciation which the language of Article 1 suggests was intended.

J. G. MERRILLS

DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING 1985-6*

Discrimination on grounds of sex—employment—age for compulsory retirement—when do directives create rights for individuals?—conflict between Community law and national law

*Case No. 1. Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching).*¹ Miss Marshall, the plaintiff, was employed by the defendant as a dietician. The defendant's policy, which formed an implied term of its contracts of employment, was to require employees to retire when they became eligible for retirement pensions from the State, i.e. at 60 for women and 65 for men. When Miss Marshall was forced to retire under this policy, she brought an action in the English courts, alleging that the defendant's policy constituted unlawful discrimination on grounds of sex. Her case eventually reached the Court of Appeal, which asked the Court of Justice of the European Communities to give a preliminary ruling, under Article 177 of the EEC Treaty, on two questions of Community law.

The first question asked whether the defendant's dismissal of the plaintiff 'on the grounds only that she was a woman who had passed the normal retiring age applicable to women was an act of discrimination prohibited by' EEC Directive 76/207. Article 5 (1) of that Directive provides:

Application of the principle of equal treatment with regard to working conditions,² including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

In *Burton v. British Railways Board* the Court of Justice of the European Communities had said:

In the context of the directive the word 'dismissal' must be widely construed so as to include termination of the employment relationship . . . , even as part of a voluntary redundancy scheme.³

Accordingly, the defendant in the present case did not challenge the plaintiff's assumption that compulsory retirement was a form of dismissal. Instead, the defendant pointed out that social security benefits were excluded from the scope of Directive 76/207 by Article 1 (2) of that Directive, and were governed by Directive 79/7, Article 7 (1) (a) of which permits member States to fix different pensionable ages for men and women 'for the purposes of granting old age and retirement pensions and the possible consequences thereof for other benefits'. In *Burton v. British Railways Board*, the Board had set up a voluntary redundancy scheme, under which compensation would be paid to employees if they accepted

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¹ [1986] 1 CMLR 688; [1986] QB 401; [1986] 2 WLR 780; [1986] 2 All ER 584.

² 'Working conditions' means all terms of employment, and not simply the physical environment in which work is done.

³ [1982] ECR 555, 575.

voluntary redundancy during the five years before they became eligible for government retirement pensions; in other words, the scheme covered male workers aged 60 to 65 and female workers aged 55 to 60. The Court of Justice of the European Communities, relying on Article 7 of Directive 79/7, held that such a scheme did not violate Article 5 of Directive 76/207, because 'the only difference between the benefits for men and those for women' under the Board's voluntary redundancy scheme 'stems from the fact that the minimum pensionable age under the national legislation [on social security] is not the same for men as for women'.⁴ The defendant in the present case argued that the principle laid down in the *Burton* case in the context of voluntary redundancy should be applied by analogy to compulsory retirement. The Court rejected that argument:

... in view of the fundamental importance of the principle of equality [between the sexes] ... , Article 1 (2) of Council Directive 76/207/EEC, which excludes social security matters from the scope of that directive, must be interpreted strictly. Consequently, the exception to the prohibition of discrimination on grounds of sex provided for in Article 7 (1) (a) of Council Directive 79/7/EEC applies only to the determination of pensionable age for the purposes of granting old age and retirement pensions and the possible consequences thereof for other benefits ... , whereas ... this case is concerned with dismissal within the meaning of Article 5 of Council Directive 76/207/EEC. Consequently, the answer to the first question referred to the court by the Court of Appeal must be that Article 5 (1) of Council Directive 76/207/EEC must be interpreted as meaning that a general policy concerning dismissal involving the dismissal of a woman solely because she has attained the qualifying age for a state pension, which age is different under national legislation for men and for women, constitutes discrimination on grounds of sex, contrary to that directive.

This conclusion is unexceptionable, but the grounds on which the Court distinguished the *Burton* case are not clear. The Court implied that the *Burton* case was different because it concerned payment of benefits, but that distinction is unfounded; when Article 7 of Directive 79/7 speaks of 'the determination of pensionable age for the purposes of granting old age and retirement pensions and the possible consequences thereof for other benefits', the 'other benefits' referred to are clearly other social security benefits (since Directive 79/7 is concerned only with social security) and do not include voluntary redundancy benefits paid voluntarily by an employer.

The Court of Appeal's second question asked whether Directive 76/207 'can be relied upon by the appellant [plaintiff] in the circumstances of the present case notwithstanding the inconsistency (if any) between the directive and section 6 (4) of the Sex Discrimination Act 1975'. This question raised three separate issues.

The first issue was whether (or, to be more precise, in what circumstances) a directive could confer rights on an individual which he or she could enforce in a national court against the State. Unlike regulations, which (according to Article 189 of the EEC Treaty) are 'directly applicable in all member States', directives normally require implementing legislation by member States. If a State passes implementing legislation which accurately reflects the terms of the directive, a national court can apply that implementing legislation and will not need to

⁴ Ibid., p. 577. But the defendant would also have acted lawfully if the qualifying age for benefits under its redundancy scheme had been the same for men and for women; see *Roberts v. Tate & Lyle Industries Ltd.*, [1986] 1 CMLR 714.

apply the directive. But it often happens that a State fails to pass implementing legislation, or passes legislation which departs to some extent from the terms of the directive. In such circumstances the Court of Justice of the European Communities has held that the directive itself can be applied by a national court, as long as its terms are sufficiently precise and unconditional.⁵ In the present case, the Court simply reaffirmed its previous decisions on that point:

... according to a long line of decisions of the court,⁶ ... wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, these provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.

That view is based on the consideration that it would be incompatible with the binding nature which Article 189 of the EEC Treaty confers on the directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. From that the court deduced that a member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.

The Court went on to hold that Article 5 (1) of Directive 76/207 was sufficiently precise and unconditional for the purposes of this rule.

The second issue was whether a directive could confer rights on an individual *against another individual*, in the same way that it could confer rights on an individual against the State. This issue had given rise to conflicting or ambiguous *obiter dicta* in previous cases,⁷ but in the present case the Court gave a clear and negative answer.

With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each member State to which it is addressed.'⁸ It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.⁹ It must therefore be examined whether, in this case, the health authority must be regarded as having acted as an individual.

In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is

⁵ 'Unconditional' means that the implementation of the directive 'must not be subject to any further measures implying a measure of discretion on the part of either the Community organs or the member States' (Pescatore, *European Law Review*, 8 (1983), pp. 155, 161).

⁶ Some of these decisions are considered in this *Year Book*, 47 (1974-5), pp. 435-7, and 49 (1978), pp. 325-8.

⁷ Some of them were discussed by the Advocate General in the present case: [1986] 2 WLR 789-90. See also *Pubblico Ministero v. Ratti*, [1979] ECR 1629, 1645, 1650, 1654, and Easson, 'The "Direct Effect" of EEC Directives', *International and Comparative Law Quarterly*, 28 (1979), pp. 319, 342-4.

⁸ The third paragraph of Article 189 provides: 'A directive shall be binding, as to the result to be achieved, upon each member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

⁹ It is submitted that the same is true of a *decision* addressed to a member State (although such a decision can create rights for individuals *against the State* if it is unconditional and precise: *Grad v. Finanzamt Traunstein*, [1970] ECR 825, 836-9).

necessary to prevent the State from taking advantage of its own failure to comply with Community law.

It is for the national court to apply those considerations to the circumstances of each case; the Court of Appeal has, however, stated in the order for reference that the Southampton and South West Hampshire Area Health Authority (Teaching) is a public authority.

The argument submitted by the United Kingdom that the possibility of relying on provisions of the directive against the authority qua organ of the State would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees does not justify any other conclusion. Such a distinction may be easily avoided if the member State concerned has correctly implemented the directive in national law.¹⁰

The third issue concerned the effect of a possible inconsistency between Directive 76/207 and section 6 (4) of the [British] Sex Discrimination Act 1975, i.e. a conflict between Community law and national law. The Court held that Article 5 (1) of the directive 'may be relied upon as against a State authority acting in its capacity as employer, in order to *avoid the application* of any national provision which does not conform to Article 5 (1)',¹¹ but did not say anything further. But the Advocate General, Sir Gordon Slynn, examined the matter more thoroughly.

The United Kingdom did not pass any legislation to implement Directive 76/207 after its adoption in 1976, possibly because the British Government thought that the matter was already adequately covered by the Sex Discrimination Act 1975. Section 6 (2) (b) of the 1975 Act makes it unlawful for an employer to discriminate against a woman by dismissing her; this covers much the same ground as the provisions concerning dismissal in Article 5 (1) of Directive 76/207. But section 6 (4) of the 1975 Act provides that section 6 (2) (b) does 'not apply to provision in relation to . . . retirement', and in *Roberts v. Cleveland Area Health Authority* the English Court of Appeal held that, if an employer fixes a retiring age of 60 for female staff and 65 for male staff, he is acting lawfully because he is making a 'provision in relation to . . . retirement'.¹² This produces a conflict between section 6 (4) of the 1975 Act and Article 5 (1) of Directive 76/207.¹³

In *Amministrazione delle Finanze dello Stato v. Simmenthal*, the Court of Justice of the European Communities held that 'a national court which is called upon . . . to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it

¹⁰ However, although a directive on its own cannot create duties for individuals, it must be taken into account by national courts when interpreting national legislation creating duties for individuals (*Harz v. Deutsche Tradax*, [1984] ECR 1921, 1942; and see the discussion of *von Colson and Kamann v. Land Nordrhein-Westfalen* on pp. 481-2, below). This resembles the rule of English law that the European Convention on Human Rights does not create rights for individuals (*Malone v. Metropolitan Police Commissioner*, [1979] Ch. 344), but can be taken into account by English courts when interpreting English legislation (*Waddington v. Miah*, [1974] 1 WLR 683, 694, HL).

¹¹ Emphasis added.

¹² [1979] 1 WLR 754. But see *Modern Law Review*, 49 (1986), pp. 511-12.

¹³ After the judgment of the Court of Justice of the European Communities in the *Marshall* case, the British Parliament passed the Sex Discrimination Act 1986, section 2 of which amends section 6 (4) of the 1975 Act so as to bring it into line with Article 5 (1) of Directive 76/207. See Fitzpatrick, 'Mandatory Retirement and the Sex Discrimination Bill 1986', *New Law Journal*, 136 (1986), p. 909.

is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means'.¹⁴

Sir Gordon Slynn, the Advocate General, preferred to adopt a more cautious approach by concentrating on the question whether national courts were under a duty to try to *interpret* national law so that it did not conflict with Community law. He said that in English law Acts of Parliament should, where possible, be interpreted so as not to conflict with earlier treaties, but that this rule did not apply to treaties concluded after the passing of the Act of Parliament in question. That is probably correct, because the purpose of interpretation is to give effect to the presumed intention of the legislator; the legislator can be presumed to intend to comply with pre-existing treaties, but he cannot be presumed to intend that his legislation should comply with future treaties, since he cannot know what their content will be. But it is submitted that Sir Gordon Slynn was wrong to conclude¹⁵ that English law did not require an English court to interpret the Sex Discrimination Act 1975 in the light of Directives 76/207 and 79/7, which had been issued after the 1975 Act had been enacted. Section 2 (4) of the European Communities Act 1972 provides that 'any enactment *passed or to be passed* . . . shall be construed and have effect subject to the foregoing provisions of this section', which include the following words in subsection 1: 'all such rights . . . *from time to time* created or arising by or under the Treaties . . . as in accordance with the Treaties are without further enactment to be given legal effect . . . in the United Kingdom shall be recognized and available in law, and be enforced . . . accordingly'.¹⁶ It is submitted that these words, especially the words printed in italics, mean that all British statutes should be interpreted so as to conform with all relevant rules of Community law, and it makes no difference whether the relevant rule of Community law came into being before or after the British statute.

Sir Gordon Slynn also argued that Community law required national courts to interpret national laws so as to conform with a directive only if the national laws had been passed in order to implement the directive. He relied on *von Colson and Kamann v. Land Nordrhein-Westfalen*, in which the Court had said that national courts should 'interpret . . . [national] legislation adopted for the implementation of the directive in conformity with . . . Community law'.¹⁷ But probably the reason why the Court limited its ruling to national 'legislation adopted for the implementation of the directive' was that that was the type of legislation with which the facts of the case were concerned. Earlier in its

¹⁴ [1978] ECR 629, 645-6. This principle is diametrically opposed to traditional British ideas of Parliamentary sovereignty, but those ideas are beginning to crumble as a result of British membership of the European Communities, and *obiter dicta* in recent English cases suggest that English courts might be prepared to go part of the way towards accepting the *Simmenthal* principle; see E. C. S. Wade and A. W. Bradley, *Constitutional and Administrative Law* (10th edn., 1985), pp. 136-8.

¹⁵ His conclusion is supported by a decision of the [British] Value Added Tax Tribunal in *Parkinson v. Commissioners of Customs and Excise*, [1986] 3 CMLR 1.

¹⁶ Italics added. The words 'without further enactment' give rise to some problems as far as directives are concerned, since directives normally need to be implemented by national legislation. However, the Court of Justice of the European Communities has consistently held that directives which are precise and unconditional can confer rights on individuals against member States, and that these rights must be enforced by national courts even in the absence of implementing national legislation; it is submitted that such rights are rights which 'in accordance with the Treaties are without further enactment to be given legal effect . . . in the United Kingdom'.

¹⁷ [1984] ECR 1891, 1911.

judgment the Court had said that, 'in applying the national law and *in particular* the provisions of a national law specifically introduced in order to implement Directive 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive'.¹⁸ The use of the words 'in particular' suggests that the particular duty to interpret national laws enacted to implement a directive so that they conform with the directive is simply part of a more general duty to interpret *all* national laws so that they conform with Community law.

Tortious liability—breach of duty of confidentiality—limitation period—contributory negligence—free trade agreement between the EEC and Switzerland

*Case No. 2. Adams v. Commission of the European Communities.*¹⁹ On 25 February 1973 Mr Adams, who was at that time working for the Swiss company Roche (or Hoffmann-La Roche & Co. AG, to give it its full name), wrote a letter to the Commission containing evidence that Roche had violated EEC rules against restrictive business practices. In his letter, Mr Adams stated that he would soon be leaving Roche and starting his own business in Italy. He concluded his letter by saying: 'I request you not to let my name be connected with this matter. However . . ., after I leave Roche around July 1973 I would be prepared . . . to appear before any court to give sworn evidence on my statements. . . .' Mr Adams later sent the Commission photocopies of a considerable number of internal documents issued by Roche.

The Commission began an investigation into Roche's activities and eventually imposed a fine on Roche for violating Article 86 of the EEC Treaty.²⁰ In the course of its investigations, the Commission in October 1974 showed to Roche executives the documents which Mr Adams had sent to the Commission. Although the Commission deleted from the documents those passages which clearly identified Mr Adams as the source of the Commission's information, Roche nevertheless managed to infer that Mr Adams had leaked the documents to the Commission. Consequently, when Mr Adams and his wife returned from Italy to Switzerland for a visit at the end of 1974, he was arrested, tried and convicted in a Swiss court for divulging Roche's trade secrets to the Commission. While he was in prison awaiting trial, his wife committed suicide. Thereafter, Mr Adams found it impossible to borrow the money which he needed for his new business in Italy, and that business collapsed.

Mr Adams sued the Commission for damages under Article 178 of the EEC Treaty, which deals with the non-contractual liability of the Community. He contended that his arrest, trial and conviction, together with his wife's suicide and his subsequent business difficulties, were the result of the Commission breaking a duty of confidentiality which it owed to him. On this point the Court of Justice of the European Communities said:

As regards the existence of a duty of confidentiality it must be pointed out that Article 214 of the EEC Treaty lays down an obligation, in particular for the members and

¹⁸ [1984] ECR p. 1909 (emphasis added).

¹⁹ [1986] 2 WLR 367; [1986] QB 138.

²⁰ The Commission's decision imposing the fine was affirmed on appeal, with minor variations, by the Court of Justice of the European Communities: *Hoffmann-La Roche v. Commission*, [1979] ECR 461.

servants of the institutions of the Community, 'not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'. Although that provision primarily refers to information gathered from undertakings, the expression 'in particular' shows that the principle in question is a general one which applies also to information supplied by natural persons, if that information is 'of a kind' that is confidential. That is particularly so in the case of information supplied on a purely voluntary basis, but accompanied by a request for confidentiality in order to protect the informant's anonymity. An institution which accepts such information is bound to comply with such a condition.

As regards the case before the court, it is quite clear from Mr Adams's letter of 25 February 1973 that he requested the Commission not to reveal his identity. It cannot therefore be denied that the Commission was bound by a duty of confidentiality towards Mr Adams in that respect. In fact the parties disagree not so much as to the existence of such a duty but as to whether the Commission was bound by a duty of confidentiality after Mr Adams had left his employment with Roche.

In that respect it must be pointed out that Mr Adams did not qualify his request by indicating a period upon the expiry of which the Commission would be released from its duty of confidentiality regarding the identity of its informant. No such indication can be inferred from the fact that Mr Adams was prepared to appear before any court after he had left Roche. The giving of evidence before a court implies that the witness has been duly summoned, that he is under a duty to answer the questions put to him, and is, in return, entitled to all the guarantees provided by a judicial procedure. Mr Adams's offer to confirm the accuracy of his information under such conditions cannot therefore be interpreted as a general statement releasing the Commission from its duty of confidentiality. Nor can any such intention be inferred from Mr Adams's subsequent conduct.

It must therefore be stated that the Commission was under a duty to keep Mr Adams's identity secret even after he had left his employer.

After reviewing the facts of the case at some length, the Court left open the question whether the Commission had broken its duty of confidentiality by showing to Roche executives the documents which Mr Adams had sent to the Commission. However, the Court held that the Commission had broken its duty of confidentiality by failing to warn Mr Adams that Roche intended to ask the Swiss police to prosecute him; this intention had been communicated to the Commission by Dr Alder, Roche's lawyer, when he visited the Commission on 8 November 1974.

It must therefore be concluded that, by failing to make all reasonable efforts to pass on to Mr Adams the information which was available to it following Dr Alder's visit on 8 November 1974, even though the communication of that information might have prevented, or at least limited, the damage which was likely to result from the discovery of Mr Adams's identity by means of the documents which it had handed over to Roche, the Commission has incurred liability towards Mr Adams in respect of that damage.

The plaintiff also contended that the Commission had acted wrongfully by failing to advise him in good time of his right to petition the European Commission of Human Rights against his conviction by the Swiss court, with the result that his eventual petition to the European Commission of Human Rights was dismissed as time barred. The Court dismissed this contention, holding that the Commission of the European Communities was under no duty to give such advice.

It is clear . . . that Mr Adams himself retained his lawyers for his defence [before the

Swiss criminal courts] and that they received instructions only from him. The Commission merely provided the information requested, in particular in relation to the free trade agreement concluded between the Community and the Swiss Confederation and, in addition, paid the legal costs. The court considers that the Commission was under no additional duty and that it was not therefore negligent in failing to give specific instructions to Mr Adams's lawyers in regard to his defence and in not directly advising him in that respect.

The Commission pleaded that Mr Adams's action, which had been initiated in 1983, was time barred under Article 43 of the Protocol on the Statute of the Court of Justice of the EEC, which provides: 'Proceedings against the Community in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto . . .' The Court said:

That provision must be interpreted as meaning that the expiry of the limitation period cannot constitute a valid defence to a claim by a person who has suffered damage where that person only belatedly became aware of the event giving rise to it and thus could not have had a reasonable time in which to submit his application to the court or to the relevant institution before the expiry of the limitation period.

In this case it must be borne in mind that the court has based its conclusion in regard to the Commission's liability on the fact that the Commission had not attempted to inform and to consult Mr Adams following Dr Alder's visit of 8 November 1974. It is clear from the information before the court that Mr Adams could not have become aware of that fact until the preparatory inquiry in these proceedings, since Dr Alder's visit was mentioned for the first time in the Commission's defence. Therefore he could not have sought to establish the Community's liability on that basis before the normal date of expiry of the limitation period.

It follows that the Commission's objection must be dismissed.

The Court concluded that 'in principle the Community is bound to make good the damage resulting from the discovery of Mr Adams's identity by means of the documents handed over to Roche by the Commission'. But the Court added:

It must, however, be recognized that the extent of the Commission's liability is diminished by reason of Mr Adams's own negligence. Mr Adams failed to inform the Commission that it was possible to infer his identity as the informant from the documents themselves, although he was in the best position to appreciate and to avert that risk. Nor did he ask the Commission to keep him informed of the progress of the investigation of Roche, and in particular of any use that might be made of the documents for that purpose. Lastly, he went back to Switzerland without attempting to make any inquiries in that respect, although he must have been aware of the risks to which his conduct towards his former employer had exposed him with regard to Swiss legislation.

Consequently, Mr Adams himself contributed significantly to the damage which he suffered. In assessing the conduct of the Commission on the one hand and that of Mr Adams on the other, the court considers it equitable to apportion responsibility for that damage equally between the two parties.

It follows from all the foregoing considerations that the Commission must be ordered to compensate Mr Adams to the extent of one half of the damage suffered by him as a result of the fact that he was identified as the source of information regarding Roche's anti-competitive practices. . . . The amount of the damages is to be determined by agreement between the parties or, failing such agreement, by the court.

In October 1986 the parties reached agreement on the amount of damages.

The Commission agreed to pay Mr Adams £100,000 as compensation for mental anguish and £100,000 as compensation for economic loss, together with payment of his legal costs.²¹ This settlement meant that the Court never passed judgment on the problems of remoteness of damage raised by Mr Adams's claim. Mr Adams alleged that his wife's suicide was caused by the shock of his arrest, and that the unwillingness of Italian banks to lend him the money which he needed for his new business was the consequence of his conviction in Switzerland. But, even if he had succeeded in proving these allegations, it is not certain that the Court would have ordered the Commission to compensate him for his wife's death and for the failure of his business; the Court might have held that these consequences were too remote to give rise to liability.

On the same day as it delivered the judgment discussed above, the Court dismissed a second claim brought by Mr Adams against the Commission.²² In his second case, Mr Adams argued that Roche's trading practices violated Article 23 (1) of the free trade agreement between Switzerland and the EEC, which prohibits abuse by undertakings of a dominant position.²³ From this provision he inferred that Switzerland had also violated the free trade agreement by punishing him for revealing evidence of Roche's trading practices. The remainder of his argument was summarized by the Court in the following words:

The Commission ought therefore to have brought the matter before the joint committee pursuant to Article 27 of the agreement, according to which either contracting party may refer a matter to the joint committee if it considers that a given practice is incompatible with the proper functioning of the agreement within the meaning of Article 23 (1), and which provides that in the absence of agreement the contracting party concerned may adopt any safeguard measures it considers necessary to deal with the serious difficulties resulting from the practices in question. By referring Switzerland's infringements of the agreement to the Committee, the Commission could have imposed sanctions on Switzerland, provided a possible remedy and, at the very least, certainly have repaired the damage caused to Mr Adams. If necessary, the Commission and the Council should have withdrawn [from] the agreement. Inasmuch as it failed to take such measures, the Commission is guilty of an omission capable of giving rise to its liability vis-à-vis Mr Adams.

But the Court rejected his argument.

As regards the submission that the Commission should have referred the matter to the joint committee set up under the free trade agreement, it must be stated in the first place that a duty to take such a step could in any event be owed to Mr Adams only if Switzerland had infringed the provisions of that agreement in relation to him.²⁴ The provisions of the agreement cited by Mr Adams are intended to provide fair conditions of competition for trade between the contracting parties and concern the means of putting an end to the

²¹ *Daily Telegraph*, 18 October 1986, p. 4.

²² [1986] QB 170; [1986] 2 WLR 396.

²³ This argument is probably correct; the Court held Roche guilty of violating Article 86 of the EEC Treaty (*Hoffmann-La Roche v. Commission*, [1979] ECR 461), and Article 23 (1) of the free trade agreement is very similar to Article 86 of the EEC Treaty.

²⁴ This sentence implies that Switzerland's prosecution of Mr Adams did not violate the free trade agreement. *Sed quaere*; although there is no provision in the free trade agreement expressly prohibiting prosecution of individuals for revealing evidence of breaches of the agreement, such prosecutions are obviously contrary to the *spirit* of the agreement. Moreover, one of the objectives of the free trade agreement is 'to provide fair conditions of competition for trade between the contracting parties' (Article 1 (b)), and the free trade agreement requires the contracting parties to refrain 'from any measure likely to jeopardize the fulfilment of the objectives of the agreement' (Article 22 (1)).

abuse of a dominant position by one or more undertakings where such abuse is likely to affect that trade. It follows that the decision whether or not to refer the matter to the joint committee may not be taken except for purposes which have to do exclusively with general interests of the Community, following an assessment which is essentially political and which cannot be challenged before the court by an individual.

It must be concluded that Mr Adams has not established the existence of a duty on the part of the Commission to refer to the joint committee the matter of the criminal proceedings instituted against him in Switzerland and that, accordingly, his submission has no foundation in law.

Mr Adams also asked the Court 'to declare that the Commission should give notice of its withdrawal from the free trade agreement if it is not successful, within a reasonable time, in convincing the [Swiss] Confederation to interpret correctly and respect international law as contained in that agreement'. The Court curtly dismissed this request, holding that it was 'manifestly outside the jurisdiction of the court in the context of . . . proceedings brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty' (which deal with the non-contractual liability of the Community) and that 'therefore it must be dismissed as inadmissible'.

MICHAEL AKEHURST

UNITED KINGDOM MATERIALS ON INTERNATIONAL LAW 1986*

Edited by GEOFFREY MARSTON¹

[*Editorial note:* Attention is drawn to the editorial note in UKMIL 1983, p. 361. The publication schedule of the present edition of UKMIL has permitted the citation of the definitive column references in the bound volumes of the Parliamentary Debates]

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¹ LLM, Ph.D. (Lond.): Lecturer in Law, University of Cambridge; Fellow of Sidney Sussex College. The assistance of Mr A. D. Watts, CMG, Deputy Legal Adviser, and Ms J. S. Foakes, Assistant Legal Adviser, Foreign and Commonwealth Office, is gratefully acknowledged.

² Based on the *Model Plan for the Classification of Documents concerning State Practice in the field of Public International Law* adopted by the Committee of Ministers of the Council of Europe in Resolution (68) 17 of 28 June 1968.

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Abbreviations

HC Debs.	<i>Hansard</i> , House of Commons Debates (6th series)
HL Debs.	<i>Hansard</i> , House of Lords Debates
Cmnd.	Command Paper (5th series)
Cm.	Command Paper (6th series)
UKMIL	<i>United Kingdom Materials on International Law</i>
TS	<i>United Kingdom Treaty Series</i>

Part One: II. D. *International law in general—relationship between international law and municipal law—implementation of international law in municipal law*

(See also Part Nine: XV. D., below)

In a debate in the House of Lords to take note of the report of the Select Committee on the European Communities entitled 'External

Competence of the European Communities' (*Parliamentary Papers*, 1984-5, HL, Paper 236), certain observations were made by the chairman of the Committee, Lord Templeman, a Lord of Appeal in Ordinary, which, although they are not words of the Government, are considered worthy of reproduction here. He remarked:

In English law the power of concluding a treaty with a foreign country has always been vested in the Crown—now, of course, advised by the Cabinet. But if a provision of that treaty can be brought into effect only by altering the laws of the United Kingdom then, of course, that treaty provision will be ineffective unless and until Parliament has pronounced on an alteration of the law. To take a very ancient example, when Mary Tudor married Philip II of Spain she was able, as a Queen, to enter into a treaty of friendship with Spain; but she was unable to effect a restoration of property of the Catholic Church unless and until Parliament had repealed the provisions of Henry VIII whereby that property had been confiscated.

In more recent times the United Kingdom Government have been able to enter, and have entered, into treaties with foreign countries for the abolition of tariffs and the removal of obstacles to trade. But effect could only be given to most of those provisions by an enactment by Parliament or under powers bestowed by Parliament which enabled customs duties and other imposts to be reduced.

In English law the power of the Crown to enter into treaties and the supremacy of Parliament over the law are harmonised in a typical compromise way. If a treaty entered into by Her Majesty's Government requires United Kingdom legislation for its implementation then the treaty is not ratified by the Government until the necessary legislation has been passed. Even when legislation is not necessary, the treaty is laid before Parliament 21 days before it is ratified in order that Parliament may express its views and possibly enforce its views. That is the result of what is known as the Ponsonby Rules—so-called because they were enacted or brought into effect, or promised, by, I think, the grandfather of the noble Lord, Lord Ponsonby of Shulbrede. They are the rules which govern the respective powers of the Crown and Parliament with regard to treaties with foreign countries.

(HL Debs., vol. 470, col. 485: 27 January 1986)

In moving the second reading in the House of Commons of the European Communities (Amendment) Bill, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated in part:

The Bill will give effect in United Kingdom law to the changes to the treaties establishing the European Communities, which were agreed by the Prime Minister and other European Community heads of Government in Luxembourg last December. That agreement is contained in the Single European Act, which was signed on behalf of the United Kingdom by . . . the Minister of State on 17 February. That Act embodies not only those agreed changes but also the new, specific treaty provisions on political co-operation that were introduced at the initiative of the United Kingdom.

I would like first of all to describe the Bill and then the Single European Act and its implications for the United Kingdom. The Single European Act involves

changes in Community law. The main purpose of the European Communities (Amendment) Bill is to give effect to those changes as part of Community law applicable in the United Kingdom. The principal vehicle for that is Clause 1, under which the relevant part of the Single European Act becomes a Community Treaty within the meaning of the European Communities Act 1972.

Clause 2 covers the agreement by Heads of Government to attach a new court of first instance to the European Court of Justice. There is no question of extending the powers of the court to new areas. The court of first instance will simply provide for the more efficient disposal of the court's growing workload. This is a much needed improvement. The Bill will ensure that decisions of the new court of first instance will be given effect in United Kingdom law.

Clause 3 provides for the change in title of the European Assembly, which will formally be known as the European Parliament once the Single European Act enters into force. In this country it has already for some time been the practice of successive Governments to use the term European Parliament in all but formal legal documents. It is the term that was used by all the major parties in their manifestos for the direct elections to the Parliament in 1984 and indeed in all their manifestos in the 1983 general election as well. So clause 3 brings the law into line with well-established practice.

(HC Debs., vol. 96, cols. 316-17: 23 April 1986)

Part Two: I. Sources of international law—treaties

(See also Part Six: II. A. (item of 14 March 1986), below)

In reply to a question on the subject of the status of the Memorandum of Understanding on strategic defence initiative research signed with the US on 6 December 1985, the Minister of State for Defence Support wrote in part:

It is not a treaty and does not therefore have the legal force of one.

(HL Debs., vol. 469, col. 1058: 14 January 1986)

The Government made certain written observations on the Third Report from the Foreign Affairs Committee of the House of Commons, which dealt with the subject of the Single European Act. Referring to the Committee's report (*Parliamentary Papers*, 1985-6, HC, Paper 442 of 9 June 1986), the Government wrote in part:

The Committee say that the use of the term 'Act' has created some confusion (para 10). In fact, as the Committee note, the Single European Act is a Treaty like any other. The term 'Act' has been used in the past, for example, for the 'Act' setting out the conditions under which the United Kingdom, Ireland and Denmark joined the Community in 1973, together with the necessary amendments to the original Community Treaties.

(Cmnd. 9858, para. 4)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The decision adopted by Foreign Ministers of the Twelve on the occasion of the signing of the Single European Act sets out procedures for the practical application of certain aspects of title III of the Single European Act. It is not a treaty, is not subject to ratification, and the Ponsonby rules do not apply.

(HC Debs., vol. 99, Written Answers, col. 647: 20 June 1986)

Part Two: II. *Sources of international law—custom*

(See also Part Thirteen: I. D. (item of July 1984), below)

In the course of a speech on 11 November 1986 to the Sixth Committee of the UN General Assembly considering the report of the International Law Commission, the UK representative, Sir John Freeland, turned to the topic of the progressive development and codification of international law. He remarked:

There is a clear need to eliminate some of the uncertainties inherent in the application of rules of customary international law. As that great jurist, the late Sir Hersch Lauterpacht, stated more than thirty years ago:

‘For, once we approach at close quarters practically any branch of international law, we are driven, amidst some feeling of incredulity, to the conclusion that, although there is as a rule a consensus of opinion on broad principle—even this may be an overestimate in some cases—there is no semblance of agreement in relation to specific rules and problems’: 49 *A.J.I.L.* (1955) p. 17.

This observation is as true today as it was when first pronounced in 1955. And it has, as a consequence, that the codification process demands a combination of imagination and flexibility, on the one hand, and of prudence and caution, on the other hand. There is in the development of international law a continuing requirement to balance what has been referred to as ‘the antinomies of stability and change’. We build on past experience; we cannot do otherwise. We also have to make the difficult attempt to anticipate the future.

(Text provided by the Foreign and Commonwealth Office)

Part Two: VI. *Sources of international law—equity*

(See Part Twelve: II. G. 1. (para. 6 of Article 8 of treaty of 12 February 1986), below)

Part Two: VIII. *Sources of international law—restatement by formal processes of codification and progressive development*

(See also Part Two: II., above, and Part Nine: VII. A. 1. (item of 15 July 1986), below)

By a communication dated 22 August 1986, the Permanent Representative of the UK to the UN in New York, Sir John Thomson, stated:

1. On behalf of the European Community and its twelve member States, the Presidency of which is currently held by the United Kingdom, the Permanent

Representative of the United Kingdom presents his compliments to the Secretary-General of the United Nations and has the honour to refer to the latter's note of 6 February 1986 concerning General Assembly resolution 40/67 of 11 December 1985 entitled 'Progressive development of the principles and norms of international law relating to the new international economic order'.

2. In his note, the Secretary-General sought the views and comments of Member States with respect to the analytical study prepared by the United Nations Institute for Training and Research pursuant to paragraph 1 of General Assembly resolution 40/67. The member States of the European Community also refer to their note of 31 May 1985 in which they informed the Secretary-General that the UNITAR study required careful consideration by them. What follows are the comments by the Community and its member States on the UNITAR study as contained in UNITAR/DS/5 and UNITAR/DS/6 of 15 August 1982 and 10 October 1983, together with document A/39/504/Add. 1 of 23 October 1984 which summarizes both the first mentioned documents. The Community and its twelve member States have prepared a concise selective commentary on the study, highlighting various aspects of importance to them rather than analysing the whole study in detail.

3. UNITAR has produced a substantial study based on extensive research, describing in detail the main instruments by which the international community, particularly within the framework of the United Nations system, has attempted to adjust international economic relations in the light of new circumstances, in particular the need to take steps to foster development. While the study reveals a considerable measure of agreement within the international community on the nature of the problem and the action which is needed, it does not conceal the difficulties which have been encountered and the differences of opinion which have emerged. In general, it is a valuable survey which permits evaluation of the progress and gradual clarification of the principles and techniques of international economic co-operation.

4. The Community and its member States note with interest the consideration given to its own actions and specific policies in this field. It can be seen to have shown a long-standing awareness of development issues and to have entered at an early stage into extensive international commitments, a course which it will continue to follow.

5. Naturally, bilateral or regional agreements such as those concluded by the Community are binding only on their signatories, although they may, like the Lomé Convention, for instance, constitute a milestone and a model of international economic co-operation.

6. The question is whether such a study can support conclusions of general application and having the character of law, and more specifically whether it can be regarded as giving rise to a set of rules or complete legal system to govern international economic relations. This question requires a careful answer.

7. The United Nations Charter, particularly Articles 1 and 2, sets out the aims and principles of international co-operation, including economic co-operation, and defines Members' obligations. Any rule of law governing international economic relations must derive from recognized sources of international law, notably international conventions and custom.

8. While resolutions of the General Assembly and other United Nations bodies reflect a fairly clear line of approach to the organization of international

economic relations, they cannot in themselves constitute a body of law binding on the members of the international community, and indeed the UNITAR study acknowledges that these resolutions have the status of recommendations. In addition, a number of the resolutions are not, either in whole or in part, based on consensus.

9. Overall, the Community and its member States believe that considerable progress has been made in recent years in international economic co-operation, going hand in hand with acknowledgement of the special needs of developing countries and measures to help those countries. While admittedly we have not yet made sufficient progress towards development, many developing countries have nevertheless managed to improve their lot, in some cases by judicious domestic adjustments. This is mirrored by the instruments adopted by the international community. Some of these instruments are binding on the parties, while others, though they reflect trends or map out directions, do not confer legal obligations.

The communication then discussed in detail certain specific aspects of the UNITAR study and concluded as follows:

26. The Community and its member States consider that the UNITAR study offers an in-depth analysis of the evolution of international economic relations as reflected in the texts adopted in particular within the framework of the United Nations. In the above comments we have stressed the complexity of the issues involved and have indicated some of the areas in which we see particular difficulties. The Community and its member States therefore conclude that, following this comprehensive study, no further work appears to be called for.

(A/41/536, pp. 14-18, *passim*)

In the Sixth Committee of the UN General Assembly on the same subject, the UK representative, Mr D. M. Edwards, stated on 26 November 1986 in explanation of vote:

I have the honour to speak on behalf of the twelve Member States of the European Community. The Community and its Member States explained their views during the debate on this item. They also made known their view that, while the study prepared by UNITAR was a useful and comprehensive one, no further work was needed. In these circumstances we were unable to accept the penultimate preambular paragraph which refers to the need for the codification and progressive development of the principles and norms of international law relating to the new international economic order. We would draw particular attention to the fact that the equivalent preambular paragraph in last year's resolution on this subject spoke only of a 'systematic and progressive development' of the law in question. The concept of codification has been introduced, as a new element, in various preambular and operative paragraphs in this year's resolution and is one which the Community and its Member States are unable to accept is appropriate in the current exercise. Before codification of a branch of the law can usefully begin, there must be general agreement that principles and norms in that branch of law have reached a sufficient degree of acceptance by the international community to make the exercise viable. As we explained in our comments to the Secretary-General (contained in document A/41/536 of [22]

September), we do not believe this essential requirement is satisfied. Indeed, as we pointed out in paragraph 19 of our comments, there is a real difficulty in establishing a direct link between various internationally agreed and by no means categorical texts on the one hand, and the definition of a new international economic order on the other.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/41/SR. 54, p. 11)

In the course of a speech on 11 November 1986 to the Sixth Committee of the UN General Assembly considering the report of the International Law Commission, the UK representative, Sir John Freeland, remarked:

I would like to conclude by offering a few general remarks on the role which the International Law Commission plays in the progressive development and codification of international law. It is all the more appropriate to do so this year when the Commission has completed its quinquennium in its current composition. When the General Assembly established the Commission in 1948, for the first time in the long history of international law there was brought into existence a standing body devoted exclusively to preparing substantive proposals for the progressive development and codification of the major branches of international law. The successive expansions in the membership of the Commission have ensured that it is now broadly representative of the varying trends of opinion to be found within the international community of States; and the fact that the Commission consists of distinguished international lawyers elected in their personal capacity gives to those who are called upon to discharge this highly responsible task the necessary independence of mind and of outlook required for the preparation of projects likely to command a high degree of general acceptance.

There is no doubt that, over the 38 years of its existence, the Commission has a long string of successes to its credit. The 1958 Geneva Conventions on the Law of the Sea, although now to an extent overtaken by subsequent developments, constituted, at the time of their adoption, a landmark in the history of attempts to formulate general rules for regulating the competing uses of ocean space. The Vienna Conventions on Diplomatic Relations and Consular Relations have been widely ratified; and the Vienna Convention on the Law of Treaties, although it has not been so widely ratified, has established itself over the years as the foundation stone of the modern law of treaties.

The picture is not, however, one of unqualified success. Some of the projects prepared by the Commission have resulted in conventions which have not yet entered into force or which have failed to receive widespread acceptance by Governments. The reasons for failure of a particular codification effort are many and various. This is not the occasion for a full analysis of these reasons. I would, however, point out that, sometimes, the lengthy period of gestation of a topic within the Commission may of itself result in a failing of interest by governments in the eventual project reported out by the Commission. The initial enthusiasm for codification of a particular topic may have waned by the time the Commission has completed its consideration of the matter.

Sir John Freeland concluded:

In the Commission, we have a precious instrument dedicated to a long-term

objective. That objective remains, and has lost none of its potency over the years. My delegation would renew their faith in, and dedication to, that objective, in the firm conviction that the Commission, in its new composition, will continue to function as the prime originator of proposals bearing upon the progressive development and codification of international law.

(Text provided by the Foreign and Commonwealth Office; see also A/C. 6/41/SR. 39, pp. 5-6)

Speaking on 14 November 1986 in the Sixth Committee of the UN General Assembly on the subject of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the UK representative, Mr D. M. Edwards, stated:

In short, we consider, Mr Chairman, that the outcome of the Conference held in Vienna in February and March this year, on the Law of Treaties between States and international organizations or between international organizations, represents an undoubted success for the codification process. The new Convention should prove a valuable complement, in practice, to the 1969 Vienna Convention on the Law of Treaties, itself one of the main achievements in modern codification. This recent success is one which is particularly relevant after the setback in 1983, when the Conference on Succession of States in respect of State Property, Archives and Debts ended with a severely divided vote.

(Text provided by the Foreign and Commonwealth Office; see also A/C. 6/41/SR. 45, p. 4)

Part Three: I. A. 1. *Subjects of international law—States—international status—sovereignty and independence*

(See also Part Three: I. B. 1., and Part Thirteen: I. D., below)

In moving the second reading in the House of Lords of the Australia Bill, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

I have it in command from Her Majesty the Queen to acquaint the House that Her Majesty, having been informed of the purport of the Australia Bill, has consented to place Her prerogative and interest, so far as they are affected by the Bill, at the disposal of Parliament for the purposes of the Bill.

I beg to move that this Bill be now read a second time.

Relations between Australia and the United Kingdom are of the greatest importance. The Bill before this House will confirm the United Kingdom's formal recognition of Australia's status as an independent nation. As such the removal of the old residual constitutional links is not a cause for sadness but rather a cause for satisfaction.

This Bill before your Lordships is at the request and with the consent of the Parliament and Government of the Commonwealth of Australia. This request and consent has been expressed in the Australia (Request and Consent) Act 1985, enacted in December 1985 by the Commonwealth Parliament in Australia. That legislation was itself enacted with the concurrence of all the states of

Australia, expressed in legislation enacted in September and October 1985 by each state legislature. In its passage through the state legislatures and the federal Parliament, the legislation was supported by all Australian political parties.

The purpose of the Bill is to remove the remaining constitutional links which still exist between the United Kingdom and the Australian states. It may surprise some noble Lords to know that such links still exist at all. They stem from the way the Commonwealth of Australia was established in 1901 as a federation of what were until then several separate British colonies. On federation certain powers and functions were conferred upon the Commonwealth authorities, but, subject to that, the several states retained their previous powers and functions: in law, in effect, they retained their status as colonies of the United Kingdom. As such, they remained subject to restraints and to control from the United Kingdom which, with the development of Australia to independent statehood, became inappropriate.

The quasi-colonial status of the Australian states meant that, in respect of those states, Her Majesty was Sovereign in right of the United Kingdom. Accordingly, in exercising her powers in relation to the states, Her Majesty has hitherto been formally advised by her United Kingdom Ministers. Under the Bill, Her Majesty will continue to be Sovereign in respect of the states, but no longer in right of the United Kingdom. In her Australian capacity, she will be advised—in accordance with the provisions of the Bill—by Australian state Premiers just as, in relation to Australian Commonwealth matters, she is advised by her Australian Commonwealth Ministers. The Bill makes no other change in the position of Her Majesty as Queen of Australia.

The Australian Government's request is made pursuant to Section 4 of the Statute of Westminster 1931 which states that,

'No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.'

The details of the Bill are the result of extensive consultations. These have taken place over a number of years between the Australian state and Commonwealth Governments, and more recently between the Australian Commonwealth and United Kingdom Governments.

Her Majesty approved the proposals in the middle of last year. Since then, all the states and the Commonwealth of Australia have passed legislation in their own legislatures. Royal Assent in Australia was given on 4th December to the Australia (Request and Consent) Act 1985, passed by the Commonwealth Parliament. The Australian Government's formal request to the United Kingdom Government for the enactment of complementary legislation at Westminster was received soon afterwards in a letter from Mr. Hawke to the Prime Minister. This is the Australia Bill before your Lordships.

The Bill is precisely drafted to mirror exactly the Australian legislation. Briefly, the Bill will remove the British Parliament's power to make laws for Australian states. It will terminate the responsibility of the Government of the United Kingdom for the government of any Australian state. It will remove certain powers of Her Majesty, as the Queen of the United Kingdom, exercisable on the advice of United Kingdom Ministers, to disallow or to suspend the

operation of state laws; it will also remove certain restraints, for example, under the Colonial Laws Validity Act 1865, on the legislative powers of Australian states. It will terminate appeals to the Privy Council from state courts, and will deal with the exercise of powers and functions of the Queen in respect of the states including matters affecting the appointment of Governors. The Bill will also make consequential amendments to the Constitution Acts of Queensland and Western Australia.

I should like to turn now to the detailed provisions of the Bill. Clause 1 terminates the power of the Parliament at Westminster to legislate for the Australian states and makes it clear that Parliament at Westminster can no longer legislate for the Australian Commonwealth or an Australian territory. Thus, the clause achieves the complete legislative independence of Australia from the United Kingdom.

Clause 2 allows each state Parliament to legislate with extra-territorial effect and to exercise those legislative powers which at present the United Kingdom Parliament might exercise in respect of the state. Clause 3 puts an end to restrictions on the legislative powers of state Parliaments in respect of their legislation which might conflict with United Kingdom law. These restrictions flow from the states' quasi-colonial status.

Clause 4 repeals Sections 735 and 736 of the Merchant Shipping Act 1894, in so far as they are part of the law of a state. Clause 5 qualifies Sections 2 and 3(2) by making them subject to the Commonwealth of Australia Constitution Act and the Commonwealth constitution. Clause 5 also provides that those provisions do not operate so as to give any force or effect to any state Act that would repeal, amend or be repugnant to them or to the Statute of Westminster or to this present Act. Clause 6 requires that state laws continue to be made in such manner and form as may be prescribed by the law of that state.

Clause 7 makes new provisions for the powers and functions of Her Majesty the Queen and Governors in respect of states. Her Majesty's representative in each state continues to be the Governor. It is the Governor alone who will exercise the powers of Her Majesty, except on the appointment or the termination of the appointment of a Governor and at times when the Queen is personally present in the state. On those two matters the Bill provides for the Queen to act on the advice of the Premier of the state concerned, although when she is personally present in a state any such advice to the Queen would only be tendered in accordance with the mutual and prior agreement between the Queen and the Premier. This arrangement was agreed between the Australian federal and state authorities and the Palace.

Clause 8 will put an end to existing powers of the Queen, in her capacity as Queen of the United Kingdom, to disallow state laws, and will prevent any requirement for the operation of state laws to be suspended pending signification of the Queen's pleasure. Clause 9 nullifies the requirement for a state Governor to withhold assent from any Bill duly enacted by the state legislature or to reserve any state Bill for the signification of Her Majesty's pleasure. Clause 10 provides that, after the commencement of the Act, the United Kingdom Government will have no responsibility for the government of any state.

Clause 11 will terminate appeals to Her Majesty in Council from or in respect of any decision by an Australian court. However, it will not affect an appeal instituted before the commencement of this legislation, or an appeal for which

leave has been given before the commencement of the Act. I should perhaps repeat here that this step has the unanimous support of all parties in the states and Commonwealth of Australia.

Clause 12, which supplements Clause 1, expressly repeals Section 4, subsections 9(2) and (3) and subsection 10(2) of the Statute of Westminster 1931, in so far as they are part of the law of the Commonwealth, of a state or of a territory. Section 4 of the Statute of Westminster allows the Parliament of the United Kingdom to legislate for the Commonwealth of Australia with its request and consent, and Section 9(3) specifies that that request and consent is that of the Commonwealth Parliament and Government. Section 9(2) made exceptions to maintain the power of the states to request legislation by Parliament at Westminster; and Section 10(2) allowed the Commonwealth of Australia to revoke its adoption of the Statute of Westminster. In view of Clause 1, these provisions no longer serve any purpose under the new constitutional relationship as established by the present legislation.

Clauses 13 and 14 make amendments to the Constitution Acts of Queensland and Western Australia respectively. These two states' constitutions are the only ones which include specific provisions relating to the appointment of their Governors, and these clauses are consequential upon the termination of the powers and responsibilities of United Kingdom Ministers in respect of the states. Clause 15 provides that the proposed legislation and the Statute of Westminster, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, a state or a territory, can be repealed or amended only by the Commonwealth Parliament at the request, or with the concurrence, of the Parliaments of all the states. An exception is made in respect of Commonwealth legislation enacted pursuant to any constitutional alteration made, in accordance with Section 128 of the constitution of the Commonwealth of Australia after the commencement of the present Act. Section 128 sets out the way in which the constitution of the Commonwealth can be amended.

Clauses 16 and 17 provide for matters of interpretation, short title and commencement. It has been agreed between the Commonwealth and state governments that the Australia Acts to be enacted by the Commonwealth and United Kingdom Parliaments should come into operation at the same time.

I am sure that the whole House will wish to join with the Government in welcoming this Bill. It represents and embodies Australian wishes. All parties in all state legislatures and the Commonwealth Parliament support the proposals outlined in the Bill. As I said at the beginning, legislation has been enacted in all state and Commonwealth legislatures, smoothly and without controversy. It is right that this House should agree to the removal of these residual constitutional links at the request of the representatives of the Australian people. The provisions of this Bill will substitute new arrangements which accurately reflect Australia's well-established status as an independent and sovereign nation. I commend this Bill to the House.

(HL Debs., vol. 469, cols. 1166-9: 16 January 1986; see also HC Debs., vol. 91, cols. 81-3: 3 February 1986)

In the course of a debate on the subject of the European Community, the Minister of State, Foreign and Commonwealth Office, Mrs Lynda Chalker, observed:

Every international treaty can be interpreted as a diminution of national power, in so far as it limits freedom of independent action, yet, inevitably and rightly, we have entered into treaties because we believed that the benefits of combined action at international level outweighed the theoretical limitations on our sovereignty.

(HC Debs., vol. 93, col. 396: 5 March 1986)

In the course of a debate in the House of Lords on the second reading of the United Nations (Namibia) Bill, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

. . . South Africa was, in practice, an independent and sovereign State by 1920, recognised formally as such in 1926 . . .

(HL Debs., vol. 474, col. 805: 7 May 1986)

Part Three: I. A. 2. *Subjects of international law—States—non-intervention and non-use of force*

(See also Part Eleven: II. D. 2., below)

In reply to a question on the subject of detention of British subjects abroad, the Minister of State, Foreign and Commonwealth Office, wrote in part:

All cases of detention of which we are notified are monitored by our posts overseas. In accordance with generally accepted international practice, we cannot intervene in the due process of law in another sovereign country any more than we would accept intervention in our own judicial process.

(HC Debs., vol. 89, Written Answers, col. 473: 13 January 1986)

In the course of a speech in the UN Security Council on 6 February 1986, the Permanent Representative of the UK, Sir John Thompson, stated:

It is also a common interest of mankind that all Governments and all peoples should act consistently with the principles and provisions of the United Nations Charter. We must all fully respect the undertaking which our membership of the United Nations involves. There is no excuse for State-sponsored terrorism. It is a direct contravention of the obligations of the Members of the United Nations.

States not only have an obligation to refrain from illegal acts, and I can think of little that is more likely to promote chaos and anarchy than State sponsored terrorism: they also have positive obligations to other States and to individuals.

. . . .
Acts of terrorism or attempts to apprehend terrorists which themselves are inconsistent with international law cannot help us with the crucial objective of promoting the cause of peace in the Middle East. Those, whether States or individuals, who undertake acts of violence damage peace in itself. In destroying and maiming the bodies of poor, innocent travellers and others, the terrorists violate the body of peace and confidence between peoples. Thus the Council

should affirm that all States, including Israel, and all individuals should desist from wrongful acts which take or jeopardize the lives of innocent persons.

(S/PV. 2655, pp. 119-22)

On 17 April 1986, in the UN Security Council, the UK Permanent Representative, Sir John Thomson, stated:

My delegation supports the principles which have been invoked by many speakers, of the need to seek the peaceful settlement of disputes and to refrain from the threat or use of force, in accordance with Article 2 of the Charter. Those principles continue to apply, and they apply to Libya as to any other Member State. Can anyone declare, with a clear conscience, that Libya has refrained in its international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations, to quote Article 2 (4)?

(S/PV. 2679, p. 26)

In the course of a speech in ECOSOC on 19 May 1986 on the subject of the work of the UN Human Rights Commission, the UK representative, Ms E. Young, stated:

Perhaps the allegation most frequently levelled against the Commission is that its activities constitute interference in the internal affairs of states. My delegation has no patience with that argument. The Commission's examination of particularly serious human rights situations in certain countries has a clear basis in Articles 55 and 56 of the Charter, as well as in relevant UN resolutions, such as ECOSOC Resolutions 1235 and 1503. Almost every Member State of the United Nations has recognised the legitimacy of this activity by supporting resolutions at the Commission or at the General Assembly about the human rights situation in particular countries. But there are some states, which while happy to support resolutions critical of governments with which they are unfriendly, reject resolutions critical of governments with which they are friendly as unacceptable interference in those countries' internal affairs. That position is as unacceptable as it is inconsistent. In the United Nations, based on the principle of sovereign equality, there must be equal treatment for all nations, large or small, of whatever region, ideology, religion or belief.

(Text provided by the Foreign and Commonwealth Office)

In reply to a question on the subject of alleged atrocities in Nepal, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr Tim Eggar, said in part:

... Nepal is a sovereign independent country, and we have no *locus standi* to intervene on behalf of Nepalese citizens.

(HC Debs., vol. 99, col. 309: 11 June 1986)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Intervention in the sense of exercising diplomatic or consular protection has

to be confined to British nationals in accordance with rules of international law.

(Ibid., vol. 99, Written Answers, col. 433: 16 June 1986)

Part Three: I. A. 3. *Subjects of international law—States—international status—domestic jurisdiction*

(See Part Three: I. B. 5. (item of 5 November 1986) and Part Thirteen: I. D. (item of July 1984), below)

Part Three: I. A. 4. *Subjects of international law—States—international status—equality of States*

(See Part Three: I. A. 2. (item of 19 May 1986), above)

Part Three: I. B. 1. *Subjects of international law—States—recognition—recognition of States*

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We recognise the state of Afghanistan. We do not have normal Government-to-Government dealings with the current regime.

(Ibid., col. 35: 9 June 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The normal criteria which the Government apply for recognition as a State are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in their external relations. Other factors, including some United Nations resolutions, may also be relevant.

(Ibid., vol. 102, Written Answers, col. 977: 23 October 1986)

In reply to a further question on the same subject, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We take our decisions in the light of all the information available to us, including information as to territory, population, administration and capacity for independent action.

We take decisions on the recognition of states on the basis of criteria referred to by my hon. Friend the Minister of State in her answer of 23 October. There is no particular degree or scale relevant to such decisions.

(Ibid., vol. 103, Written Answers, col. 278: 31 October 1986)

In the course of a debate on the subject of Bophuthatswana, the Minister of State, Mrs Lynda Chalker, stated:

My hon. Friends made great play about the criteria for recognition. I wish to deal with the argument that Bophuthatswana, whatever its origins, now satisfies

our criteria for recognition and should be treated as we find it today. Let us consider what that means. Bophuthatswana is a collection of several separate pieces of territory—now six—said to form an independent state. Ostensibly, it is the homeland of the Tswana people, but no state other than South Africa recognises it as an independent state. My hon. Friends have correctly described our criteria for recognition, but the fragmentation of the territory of Bophuthatswana within South Africa, the pattern of the population and the economic dependence on South Africa more than justify our refusal to recognise Bophuthatswana.

One of our criteria is that the territory should be clearly defined, which has not been the case. Recently, the South African Parliament passed the Borders of Particular States Extension Amendment Act, the result of which was to stipulate the incorporation of black communities on the borders of some of the homelands into the homelands themselves. We understand from our people in South Africa that Bophuthatswana is likely to be particularly affected by this provision and that several thousand people are involved, many of whom are non-Tswana.

(Ibid., vol. 105, col. 100: 12 November 1986)

Part Three: I. B. 2. *Subjects of international law—States—recognition—recognition of governments*

At a press conference held by the Foreign and Commonwealth Office on 25 February 1986, the following statement was made:

HMG recognised states not governments. HMG's dealings with particular administrations in a situation such as in the Philippines were influenced by the extent to which they exercise effective control. HMG's policy was pragmatic, based on the needs and nature of the situation.

(Text provided by the Foreign and Commonwealth Office)

At a press conference held by the Foreign and Commonwealth Office on 10 March 1986, it was stated:

... a protest note had been delivered to the British Embassy in Kabul about HMG's reception of Afghan resistance leader Mr Abdul Haq. Spokesman recalled that Lady Young had received a call by Mr Haq, who was in the UK as a guest of Government, on 3 March. He would be seeing the Secretary of State and the Prime Minister tomorrow.

At a later press conference, held on 13 March 1986, the Foreign and Commonwealth Office explained:

HMG had not replied to the protest note from the Afghans about HMG's reception of Afghan resistance leader Mr Abdul Haq. The note was being returned by the British Chargé d'Affaires.

... HMG did not have normal government-to-government dealings with the Karmal regime. The British Embassy in Kabul dealt only with the Protocol Department of the regime's Foreign Ministry. This note however had apparently originated from a Political Department and could not therefore be accepted.

(Texts provided by the Foreign and Commonwealth Office)

In reply to a question asking whether Her Majesty's Government will grant permission to Dr Anahita Ratebzad for a visit to the UK to publicize Afghanistan's peace proposals, the Prime Minister wrote in part:

We do not regard the Karmal regime as a legitimate regime. It would not, therefore, be appropriate for Dr. Anahita Ratebzad, as a senior member of that regime, to visit this country.

(HC Debs., vol. 93, Written Answers, col. 545: 13 March 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We are not aware that the Contras have established a 'provisional Nicaraguan government', although one of their leaders is reported to have said that this is their intention. The question of recognition does not arise, since it is our policy to recognise states rather than governments.

(HL Debs., vol. 480, col. 798: 14 October 1986; see also HC Debs., vol. 106, Written Answers, col. 308: 27 November 1986)

Part Three: I. B. 5. *Subjects of international law—States—recognition—non-recognition*

(See also Part Three: I. B. 1. (item of 12 November 1986 concerning Bophuthatswana) and Part Three: I. B. 2., above, and Part Three: III. D. (item of 11 June 1986), below)

In reply to a question on the subject of copyright piracy in Taiwan, the Minister of State, Department of Trade and Industry, wrote:

It is not possible for the Government to make representations direct to the authorities in Taiwan, which the United Kingdom does not recognise. Taiwan has, however, recently introduced a new copyright law which will protect foreign works if they are registered in Taiwan, provided that the country of which the authors of those works are nationals gives reciprocal copyright protection. To ensure eligibility of works of United Kingdom authors for registration in Taiwan the United Kingdom made an Order in Council on 18 November 1985 providing the necessary protection in the United Kingdom for works originating in Taiwan. No further action is contemplated unless there is evidence that the new Taiwan law is failing to protect United Kingdom works against copyright piracy.

(HC Debs., vol. 82, Written Answers, col. 190: 19 March 1986)

In reply to the question

. . . if any recent consideration has been given to developing diplomatic relations with the Democratic People's Republic of North Korea; if she will seek to arrange a meeting with that country's president, to discuss the matter;

the Prime Minister wrote:

There are no plans to develop diplomatic relations with North Korea which we do not recognise as a state. Nor do I intend to seek a meeting of the kind proposed by the hon. Member.

(Ibid., vol. 94, Written Answers, col. 314: 21 March 1986; see also *ibid.*, vol. 95, Written Answers, col. 245: 14 April 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We do not recognise as a separate state any part of the USSR. Our acceptance in the negotiations leading up to the establishment of the United Nations that the Ukrainian SSR and the Byelorussian SSR, as well as the USSR, should be treated as full UN members with appropriate voting and other rights, does not affect that position.

(Ibid., vol. 94, Written Answers, col. 341: 24 March 1986)

In the course of litigation in the Queen's Bench Division of the High Court, the Foreign and Commonwealth Office, Southern African Department, addressed the following letter, dated 1 May 1986, to the solicitors for the defendants:

Thank you for your letter of 10 April 1986 in which you ask, on your own behalf and that of the solicitors for the plaintiffs and the third party, for answers to the following questions:—

'1. What recognition, if any, does Her Majesty's Government accord (1) the "Government of the Republic of Ciskei" and/or (2) "the Department of Public Works, Republic of Ciskei"?

2. Would it be contrary to the policy or attitudes of Her Majesty's Government for the English Courts to recognise either or both of such bodies as

- (i) contracting parties and
- (ii) capable of suing or being sued in an English Court under such names or either of them in respect of a commercial obligation assumed in its favour by the London branch of a bank licensed to accept deposits under the Banking Act 1979, a copy of which is annexed hereto?

In answer to the first of your questions, I am instructed to inform you that, consistently with the statements made in Parliament in April 1980 about the outcome of a re-examination of British policy and practice in this field, it is not the current practice of Her Majesty's Government to accord recognition to Governments. The British Government recognises states in accordance with common international practice, but so far as governments are concerned, the attitude of Her Majesty's Government is to be inferred from the nature of its dealings with the regime concerned and in particular whether Her Majesty's Government deals with it on a normal government to government basis. Her Majesty's Government does not recognise the 'Republic of Ciskei' as an independent sovereign state, either *de jure* or *de facto*, and does not have any dealings with the 'Government of the Republic of Ciskei' or 'the Department of Public Works, Republic of Ciskei'.

With regard to the second question, it would appear to the Foreign and Commonwealth Office that the capacity to contract and to sue and be sued is a matter for the Court to determine having regard to the answer given to the first question and, therefore, that it would not be appropriate for the Foreign and Commonwealth Office to answer the second question.

The solicitors then sought from the Foreign and Commonwealth Office an answer to a further question. The reply of the Foreign and Commonwealth Office Legal Advisers, dated 16 May 1986, read as follows:

Thank you for your letter of 9 May in which you ask for an answer to a third question which I understand had been approved by Mr. Justice Steyn, and which reads as follows:

‘Which state, if any, does Her Majesty’s Government recognise as

- (a) entitled to exercise or
- (b) exercising

governing authority in respect of the territory in Southern Africa known as Ciskei. Has such recognition been *de jure* or *de facto*?’

As stated in [the Foreign and Commonwealth Office’s] letter to you of 1 May 1986, it is not the current practice of Her Majesty’s Government to accord recognition to Governments. I am therefore instructed to reply that, beyond making clear that it has not recognised as independent sovereign States Ciskei or any of the other Homelands established in South Africa Her Majesty’s Government has not taken and does not have a formal position as regards the exercise of governing authority over the territory of Ciskei. Her Majesty’s Government does not have any dealings with the ‘Government of the Republic of Ciskei’ or with ‘the Department of Public Works, Republic of Ciskei’. Her Majesty’s Government has made representations to the South African Government in relation to certain matters occurring in Ciskei and others of the Homelands to which South Africa has purported to grant independence, notably on matters relating to individuals, but has not in general received any positive response from the South African Government.

(Texts provided by the Foreign and Commonwealth Office: see *Gur Corporation v. Trust Bank of Africa Ltd.*, [1986] 3 WLR 583)

At a press conference held on 3 July 1986, the Foreign Office spokesman said:

We do not recognise the self-styled Turkish Republic of Northern Cyprus and have no intention of doing so.

(Text provided by the Foreign and Commonwealth Office. See also HC Debs., vol. 105, Written Answers, col. 312: 20 November 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

There continue to be occasional informal contacts between Polisario representatives and Foreign and Commonwealth Office officials. These do not denote any change in our neutral policy towards the Western Sahara dispute. We do not recognise the ‘Sahara Arab Democratic Republic’.

(Ibid., vol. 101, Written Answers, col. 373: 14 July 1986)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We have not opened any new office in northern Cyprus. In 1960, on the independence of the Republic, we acquired a property which is now in the Turkish sector of Nicosia, to serve as the high commissioner's official residence. Since 1971, when it was last used as the residence, we have maintained a residual presence there in order to deal with inquiries from individual Turkish Cypriots and British nationals in the north. This long-standing arrangement carries no implication of recognition of the so-called 'Turkish Republic of Northern Cyprus'.

(Ibid., vol. 102, Written Answers, col. 256: 23 July 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The United Kingdom does not recognise Transkei, Venda, Bophuthatswana or Ciskei as independent States; there are therefore no official contacts with them. The so-called homelands are an integral part of the Republic of South Africa and are treated as such.

(Ibid., col. 973: 23 October 1986; see also *ibid.*, vol. 103, Written Answers, col. 30: 27 October 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Since 1972 successive Governments have acknowledged the position of the Chinese Government that Taiwan is a province of the People's Republic of China. We consider that this matter is China's internal affair to be settled by the Chinese people themselves.

(Ibid., col. 450: 5 November 1986)

Part Three: I. C. 4. *Subjects of international law—States—types of States—dependent States and territories*

(See also Part Four: VII. and Part Nine: XV. B., below)

The following item refers to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961.

On 16 December 1985 the Secretary-General of the United Nations received from the Government of the *United Kingdom of Great Britain and Northern Ireland* a communication recalling that at the time of the accession of the Leeward Islands, including St Christopher and Nevis, to the above-mentioned Convention on 9 March 1932 (*see* Treaty Series No. 38 (1932) Cmd. 4249 p. 3) Anguilla was included as part of the territory of St Christopher and Nevis. By 1978 Anguilla had a separate constitutional status as part of the Associated State of St Christopher, Nevis and Anguilla. Anguilla reverted to being a dependent territory of the United Kingdom of Great Britain and Northern Ireland on 19 September 1983 (at the time Saint Christopher and Nevis became independent) and therefore the Convention continues to apply to Anguilla.

(TS No. 43 (1986) (Cmd. 9877, p. 14))

The following communication was sent on 31 January 1986 by the UK Permanent Representative to the UN in New York, Sir John Thomson, to the Chairman of the Committee of 24:

You will know that the United Kingdom abstained on the General Assembly resolution which established the Special Committee on Decolonisation. We have nevertheless taken part in the work of the Committee and its sub-committees during much of the period since their establishment, and in recent years have been particularly grateful for your efficient chairmanship.

Throughout our association with the work of the Committee, we have constantly upheld the right of all peoples to determine their own future. Our policy towards the non-self-governing territories for which the United Kingdom is itself responsible continues to be founded on respect for this inalienable right. We do not stand in the way of independence if that is what the people of these territories want. But neither do we force independence upon them if they prefer to retain their links with the United Kingdom.

The vast majority of the non-self-governing territories for which the United Kingdom was previously responsible have chosen, and now enjoy, independence. A small number have, however, preferred to remain in close association with the United Kingdom, and although they are able to modify their choice at any time, it seems unlikely that any will do so in the near future. In these circumstances the colonial era, as far as the United Kingdom and its remaining non-self-governing territories are concerned, is over. There seems no need for the United Nations to devote time and resources to the special study of these territories' affairs.

Accordingly, I am writing to let you know that my government have decided that the United Kingdom will henceforth not take part in the work of the Special Committee on Decolonisation or its sub-committees. You and the other members of the Special Committee may rest assured that we shall continue strictly to fulfil our responsibilities under the UN Charter towards our non-self-governing territories, particularly the responsibilities set out in Article 73.

(Text provided by the Foreign and Commonwealth Office)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The island of Hong Kong was ceded in perpetuity to the Crown in 1842; the Kowloon peninsula, south of Boundary Street, was also ceded as a dependency of Hong Kong in 1860. The remainder of Kowloon was included in the 99-year lease granted in 1898. In accordance with the joint declaration of the United Kingdom and the People's Republic of China, the United Kingdom will restore the whole of Hong Kong to China with effect from 1 July 1997.

(HC Debs., vol. 94, Written Answers, cols. 339-40: 24 March 1986)

In reply to a question, the Government spokesman in the House of Lords wrote:

There are constitutional and practical difficulties in the way of direct Gibraltarian representation in the European Parliament, notably Gibraltar's status as a dependent territory.

(HL Debs., vol. 476, col. 586: 13 June 1986)

On 22 October 1986, in the Fourth Committee of the UN General Assembly, the UK representative, Ms Walpole, referred to paragraph 2 of a draft resolution which read:

The General Assembly,

...

2. *Reaffirms* that, in the absence of a decision by the General Assembly itself that a Non-Self-Governing Territory has attained a full measure of self-government in terms of Chapter XI of the Charter, the administering Power concerned should continue to transmit information under Article 73 *e* of the Charter with respect to that Territory; . . .

She went on:

My delegation abstained in the vote on the draft resolution in A/41/23 (part IV, Chapter VII), because we do not accept the assertion in operative paragraph 2 that it is for the General Assembly to decide at what point a non-self-governing territory has attained a full measure of self-government sufficient to absolve the administering power of the obligation to transmit information under Article 73 of the Charter. My delegation believes that such decisions should be left to the administering power and the local government of the non-self-governing territory concerned.

(Text provided by the Foreign and Commonwealth Office)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Hong Kong's current constitutional arrangements are contained in the Hong Kong Letters Patent 1917 to 1986 and the Hong Kong Royal Instructions 1917 to 1986. These arrangements will end when British sovereignty and jurisdiction over Hong Kong ends on 1 July 1997. From that date, Hong Kong will be a special administrative region of the People's Republic of China. A Basic Law of the SAR is now being drafted by a Committee of the National People's Congress of the PRC, in close consultation with Hong Kong people.

(HC Debs., vol. 106, Written Answers, cols. 655-6: 3 December 1986)

Part Three: I. E. *Subjects of international law—States—self-determination*

(See also Part Three: III. D. and Part Thirteen: I. D. (items of July 1984 and 18 March 1986), below)

In the course of a debate on the subject of Afghanistan, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr Timothy Eggar, stated:

We support the efforts to find a solution based on successive UN resolutions. Those resolutions would allow self-determination for the Afghan people and enable Afghanistan again to take its place among the independent, non-aligned nations.

(Ibid., vol. 93, col. 1214: 13 March 1986)

In the course of a debate on Middle East affairs, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

The Government remains firmly committed to this search for a peacefully negotiated settlement on the basis of the principles set out in the Venice declaration, which are upheld by our European partners, of respect for the right of Israel to secure borders and equal respect for the right of the Palestinians to self-determination. Let there be no doubt about our recognition of the importance of that issue.

(Ibid., vol. 95, col. 953: 16 April 1986; this statement is representative of many made by UK spokesmen in 1986)

In reply to a question, the Prime Minister wrote:

The agreement between the United Kingdom and the Republic of Ireland signed on 15 November 1985—in particular the joint affirmation that any change in the status of Northern Ireland would come about only with the consent of the majority of the people of Northern Ireland—is fully consistent with the commitments of the two Governments under the Helsinki accords in regard to the inviolability of frontiers, the territorial integrity of participating states and the right to self-determination of peoples.

(Ibid., vol. 98, Written Answers, cols. 561–2: 4 June 1986)

In the course of a speech on 26 February 1986 to the UN Commission on Human Rights, the UK representative, Sir Anthony Williams, remarked:

The right of self-determination applies with equal force to all peoples, to the smallest peoples among us just as much as to the largest, without discrimination. It applies, as the United Nations have consistently recognised, to the 569 people of the Cocos Keeling Islands, who have opted, significantly, for integration with the former administering power rather than independence, as well as to the 4,000 on St Helena, and the tiny populations of the British dependencies in the Caribbean.

However, Mr Chairman, we should always remember that under the Covenants self-determination is indeed a right of *peoples* and not of governments. Moreover, it is not only peoples suffering occupation by a *foreign* power which are deprived of their right of self-determination. We are all aware of appalling violations of the right of self-determination, accompanied by equally appalling violations of many other fundamental rights, perpetrated against peoples by their own countrymen. Idi Amin's atrocities in Uganda and Pol Pot's in Cambodia are perhaps the most glaring recent examples. But they are by no means the only ones.

(Text provided by the Foreign and Commonwealth Office; see also E/CN.4/1986/SR.34, pp. 3–5)

Speaking in the UN General Assembly on 23 September 1986, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated of the situation in the Middle East:

All parties should clearly and unambiguously accept two principles: the right

to existence and security of all States in the area, including Israel, and the right of the Palestinian people to self-determination and all that that implies.

(A/41/PV. 6, p. 73)

In the course of a speech in the Third Committee of the UN General Assembly on 15 October 1986, the UK representative, Ms E. Young, on behalf of the twelve Member States of the European Community, stated:

In accordance with the principles set out in the Charter, the common first article of both International Covenants proclaims the right of self-determination. It is important to remember that, under the Covenants, self-determination is a right of peoples. It applies with equal force to all peoples, without discrimination.

We have heard many speakers in this debate refer to peoples deprived of the right of self-determination through foreign invasion or occupation. And rightly so. But the mere absence of foreign invasion or occupation does not mean that a people is free to exercise its right of self-determination. Self-determination is not a single event—one revolution or one election. The exercise of this right is a continuous process. If peoples are to, in the words of the Covenants, 'freely determine their political status and freely pursue their economic, social and cultural development', they must have regular opportunities to choose their governments and their social systems freely; and to change them when they so wish. This in turn means that each individual must be able to exercise the other rights set out in the Covenants, such as the rights to freedom of thought and expression, the rights of peaceful assembly and freedom of association; the right to take part in the conduct of public affairs, either directly or through freely chosen representatives; and the right to vote and be elected at genuine periodic elections. It is on these fundamental rights that the democratic societies of the Twelve are based.

(Text provided by the Foreign and Commonwealth Office; see also A/C. 3/41/SR. 14, pp. 9–10. See also Ms Young's speech on 27 October 1986 (A/C. 3/41/SR. 25, pp. 13–14))

In a communication addressed to the UN Secretary-General on 21 November 1986, the UK Permanent Representative to the UN in New York, Sir John Thomson, stated:

It is a matter of great regret to my Government that Argentina refuses to accept the fundamental right of the people of the Falkland Islands to self-determination.

(A/41/868, p. 3; S/18473, p. 3; see also A/41/636, p. 2)

On 24 November 1986, Sir John Thomson stated in a speech to the UN General Assembly:

My Government believes that this Assembly has previously endorsed resolutions that have not only failed to make a positive contribution but have rendered yet more intractable the differences between Britain and Argentina. In providing this support for Argentina, this Assembly has also ignored a vital principle and one moreover enshrined in the UN Charter—the right to self-determination. Over the last 153 years on the Falkland Islands, a small, homo-

geneous Community, almost entirely of British stock, has developed its own political and social customs and conventions. They have made clear through their elected representatives that they do not want to become part of Argentina. Instead they wish to remain British with their own arrangements of local self-government.

...
My Government is committed to supporting their right to self-determination. I am surprised that others are not. In the last few weeks we have had debates on Namibia, on apartheid, on Palestine and so on, in which great stress has been laid on the universal right of self-determination. I could produce many quotations. If every delegation which had called for the application of the principle of self-determination were to support the Falkland Islanders, they would have an overwhelming majority.

(Text provided by the Foreign and Commonwealth Office; see also A/41/PV. 82, pp. 54-5)

Part Three: II. A. 1. (b). *Subjects of international law—international organizations—in general—legal status—powers, including treaty-making power*

In a debate in the House of Lords to take note of the report of the Select Committee on the European Communities entitled 'External Competence of the European Communities' (*Parliamentary Papers*, 1984-5, HL, Paper 236), the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated in part:

... it may help if I remind your Lordships of the legal powers under which the Community is able to enter into international commitments, either in the company of one or more member states or on its own. Generally speaking, the Community participates in international agreements wherever these agreements concern matters wholly or partly within the competence of the Community. Matters fall within Community competence where the Community treaties confer such competence, either expressly or by implication. All other matters fall within the competence of the member states.

The EEC Treaty confers express treaty-making powers on the Community in two areas. The first is the common commercial policy which is dealt with under Articles 113 and 114 of the EEC Treaty. These include wide-ranging agreements, such as the trade agreements with Norway and Sweden and other countries of the European free trade area. The second is association agreements between the Community and one or more third countries or an international organisation for which express powers are provided in Article 238. These include the important agreements with Mediterranean countries such as Morocco and Egypt.

The European Court of Justice has ruled that treaty-making powers are not confined to matters covered by the treaty articles that I have mentioned. They may be implied from the existence of internal rules laid down, for example, in Council directives and regulations. The case which gave rise to the ruling involved drivers' hours. There was already internal Community legislation, and the proposal was to have an agreement with other states on the same subject. The court held that the implied power for the Community to enter into treaties

existed whenever (a) the Community had laid down common rules to give effect to common policies and (b) it became necessary to conclude external agreements relating to the subject matter of those rules.

In such cases, it is for the Community and not the member states to conclude treaties affecting those rules. The reason for this is that it cannot be right for member states to agree on common rules to give effect to a common internal policy and then to undermine that policy by subscribing to international obligations which may contradict or conflict with the agreed rules. These ground rules are explained in greater detail in the Select Committee's report.

Certain witnesses in evidence to the committee argued that Articles 100 and 235 of the EEC Treaty could grant external competence to negotiate with third countries on any matters falling within the objectives of the Community, even when these matters have not been the subject of internal Community rules. That was a point to which the noble and learned Lord, Lord Templeman, referred. The court's case law on this matter is not entirely clear. However, the Government fully share the committee's view that in practice it will rarely be appropriate to exercise external competence under Article 235 without first adopting internal rules. If there is no need for internal rules to govern the operation of the common market, it is difficult to envisage circumstances in which it will be necessary to conclude an external agreement in order to attain one of the objectives of the Community.

I turn now to paragraphs 28 to 31 which cover competence deriving from non-binding agreements. The Select Committee also points out in its report that there are different views on the extent to which the Community can assume competence by virtue of its involvement with internationally agreed resolutions or recommendations and similar non-binding agreements. If the Community were to assume competence in this way, the powers of member states would, of course, be correspondingly reduced. Indeed, the Commission has gone further and argued in evidence that member states may not act in a way which might hamper the future development of agreements on the subject in question.

This is a grey area. It is clear that it is not open to a member state to enter into a political undertaking that runs counter to an existing Community obligation. But the Government take the view that, in general, only a subsequent legal agreement is capable of 'affecting' (to use the court's expression) an earlier agreement. The Government therefore generally endorse the committee's conclusion on this point. It should, however, be emphasised that only the court can provide a definitive interpretation of the law in this area.

It will be clear from what I have said that the Government fully endorse the committee's view that it is essential that the exclusive nature of the Community's competence should be clearly understood by all those involved in negotiations concerning the Community's external agreements. The possible impact of such agreements on the powers of the member states is most carefully examined when the Government consider proposals for the initiation of negotiations and throughout the course of such negotiations.

In each case where an extension of Community competence is involved, we consider whether it is right that the activity in question should be carried out at Community level rather than at national level.

(HL Debs., vol. 470, cols. 519-20: 27 January 1986)

Speaking later in the debate, Baroness Young said:

I turn now to paragraphs 39 to 43 of the report dealing with the doctrine of direct effect. . . . In its case law, the European Court of Justice has held that certain provisions of an agreement between the Community and a third state might, in principle, be directly effective in the courts of member states. An example is the EEC agreement with Portugal which applied before Portuguese accession to the EEC. This contained a provision for a lower duty on port wine, and the court held (in the *Kupferberg* case) that an importer could rely on this provision alone, after conclusion of the agreement, to claim the lower rate of duty. At present the doctrine is confined to provisions imposing obligations only on a state. The Government agree with the Select Committee that there are dangers in any further development of this concept. There could be considerable uncertainty in the law if one individual in a dispute with another individual were able to call in aid the provisions of an international agreement.

The Government also share the committee's view that in order to avoid any doubt, obligations entered into under international agreements should, wherever possible, be transformed by legislation into explicit Community or national law. It must, however, be acknowledged that the practice of recognising direct legislative effect for international agreements is widespread in other member states and, indeed, is the practice in the United States. . . . I mention the United States only because it in fact recognises direct effect for treaties and not in any way in connection with its federal system.

(*Ibid.*, col. 521)

Speaking on 14 November 1986 in the Sixth Committee of the UN General Assembly on the subject of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the UK representative, Mr D. M. Edwards, stated:

More central to the purpose of our present debate is . . . the question whether the United Nations should itself sign. As to that, our view, consistent with the attitude taken by the United Kingdom delegation at the Conference, is generally in favour of allowing all international organizations with a substantial treaty-making practice to make use, if their governing organs approve, of the faculty of signature and formal confirmation for which the Convention provides. The United Nations is of course an organisation which falls into that category; and we, for our part, would accordingly be ready to join in such an approval by the General Assembly if that were the general wish.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/41/SR. 45, p. 4)

Part Three: II. A. 1. (c). *Subjects of international law—international organizations—in general—legal status—privileges and immunities*

The following item refers to the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, 1947.

In a letter of 12 December 1985 the Government of the United Kingdom of

Great Britain and Northern Ireland informed the Secretary-General of the United Nations that, in view of its withdrawal from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Kingdom will withhold from UNESCO the benefits of the above Convention with effect from 13 March 1986.

(TS No. 43 (1986) (Cmnd. 9877, p. 16))

In the course of a debate on the subject of the UK's withdrawal from UNESCO, the Minister of State for Defence Support, Lord Trefgarne, stated:

The noble Lord . . . asked me about the question of immunities and privileges, the arrangements for which will now change. I do not think that any international organisation could expect to enjoy full privileges and immunities in a state which is not a member of the organisation and where it has no permanent office or staff. But there is no reason why UNESCO should be deterred from purchasing material in the United Kingdom. After all, VAT does not apply to goods for export. . . . We estimate the value of supplies purchased by UNESCO from the United Kingdom at 2.8 million dollars in 1985. If UNESCO brings to our attention serious practical difficulties which arise through the absence of privileges and immunities we are ready to consider these and provide appropriate advice.

(HL Debs., vol. 471, col. 1222: 27 February 1986)

The following note, dated 3 March 1986, was submitted by officials of the Department of Trade and Industry to the Trade and Industry Committee of the House of Commons which was considering the operation of the International Tin Council:

Note submitted by DTI officials on certain legal aspects of the operations of the International Tin Council (Tin 50)

At its session on 19 February 1986, the Committee asked officials to prepare a note on the status and confidentiality of papers and proceedings of the ITC; and asked about the law governing the operations of the ITC.

PAPERS AND PROCEEDINGS

There are two aspects of this question: firstly the responsibilities of the employees of the ITC in relation to its papers and proceedings, and secondly the responsibilities in that context of the Member States and the delegates to the ITC. These responsibilities are interconnected, but based on different rules.

2. Under Article 13.8 of the Sixth International Tin Agreement—

‘No information concerning the administration or operation of this Agreement shall be revealed by the executive chairman, the manager, the Secretary or other staff of the Council, except as may be authorised by the Council or as is necessary for the proper discharge of their duties under this Agreement.’

3. This paragraph has to be understood as covering disclosure of information to third parties, that is parties other than the Member States of the ITC and their delegates, who (with certain exceptions relating to buffer stock activities, see below) have unrestricted access to all papers and proceedings of the ITC. In

practice the paragraph is applied restrictively by the ITC, who do not authorise disclosure to third parties.

4. Under Rule 12(d) of the Rules of Procedure of the ITC—

‘All records of the proceedings of the Council shall be treated as confidential, both by the recipients of such records and the issuing body, unless the Council decides otherwise and shall be so marked.’

Under Rule 16 of these Rules of Procedure—

‘All sessions and meetings of the Council shall be private unless the Council decides that all or part of any session or meeting shall be public. Statements made in and documents presented to the private sessions and meetings shall be confidential.’

This effectively places the ITC and its subsidiary organs, as well as Member States and their delegates, under an obligation not to disclose the course of proceedings to third parties unless the ITC as a whole resolves to make an exception. In practice this is not done; all records are classified confidential.

5. The rules governing the operation of the buffer stock are even more restrictive as regards disclosure of information. Each Member State is required to designate a person to receive details of buffer stock operations and Rule 12 of the Buffer Stock Operational Rules provides as follows:

- ‘(a) Within a period of fifteen days following the end of each quarter the Manager shall forward to the designated persons of the Members a statement in a form approved by the Council of his operations relating to the quarter immediately preceding the quarter which has just ended.
- ‘(b) The delegates and designated persons receiving the quarterly statements under this Rule and persons to whom they communicate the statements shall maintain the confidential character of the contents and shall give such statements no publicity whatever.
- ‘(c) No officer of the Council shall provide any further information on the buffer stock in whatever form, explicit or implicit, except in sessions of the Council or in meetings to which all the delegates of the Members have been invited, and then only if the Council or such meeting agrees disclosure to be available.’

6. The above rules, which form part of the constitution and working arrangements of the ITC, are complemented by certain provisions of the Headquarters Agreement between the ITC and HMG (Misc No 22 of 1971). Article 4 of this Agreement provides the archives of the Council are inviolable; ‘archives’ are broadly defined and include all kinds of written material. Furthermore, the immunities required to be given under Article 8 of the Agreement would enable the ITC to resist any legal process to compel the disclosure of its records and proceedings. These provisions of the Agreement are given legal effect in the UK by the International Tin Council (Immunities and Privileges) Order 1972 (SI 1972 No. 120)—see in particular Articles 6 and 7(1). Apart from the immunity from jurisdiction of the Council itself, representatives to the Council and officers and experts of the Council enjoy immunity from jurisdiction for official acts under the Headquarters Agreement, Articles 16–19 and the Order, Articles 14–17. In practice, the ITC has not been prepared to waive any of the immunities attaching to its records and proceedings.

7. In the result, these rules mean that Ministers and officials of HMG are not in a position to disclose to the Committee any ITC papers or proceedings without the consent of the ITC: the same restriction applies to prevent oral or written evidence quoting from, or describing the substance of, such papers or proceedings. The fact that these papers and proceedings have through unofficial leaks come into the public domain does not alter the formal legal position. With a view to assisting the Committee, officials have written again to the Executive Chairman of the ITC seeking ITC consent to the release of documents and details of proceedings; this request was put before the ITC at its session on 26 February but rejected.

GOVERNING LAW

8. It is understood that the Committee wishes to know whether or not the ITC operates under UK law.

9. There are two aspects to this. Firstly, the ITC is an international body having legal status and personality as a matter of *international* law—see Article 16.1 of ITA 6, the relevant part of which states—

‘The Council shall have legal personality. It shall in particular have the capacity to contract’

10. Article 16.4 of this Agreement supplements the above by requiring the host Government (in this case HMG) to enter into the Headquarters Agreement referred to above, for the purposes *inter alia* of giving legal status to the ITC within the framework of UK law: this is done by means of Article 3 of the Headquarters Agreement, and, as a matter of UK law, by Article 5 of the 1972 Order which provides that ‘The Council shall have the legal capacities of a body corporate’. These include the capacity to contract.

11. Secondly, as regards the domestic operations of the ITC, there is no requirement in ITA 6 or elsewhere that the ITC’s contracts (principally the contracts for the sale and purchase of tin and tin futures) be governed by UK law; in practice however a large proportion of its contracts are governed by UK law, including contracts entered into by the Buffer Stock Manager which are subject to the Rules of the London Metal Exchange.

(*Parliamentary Papers*, 1985–6, HC, Paper 176–vi, pp. 190–1)

In reply to the question whether Her Majesty’s Government propose to withdraw the immunities granted to the International Tin Council under SI 1972/120, the Parliamentary Under-Secretary of State, Department of Trade and Industry, Lord Lucas of Chilworth, stated:

... as hosts to the International Tin Council, the United Kingdom is bound by the headquarters agreement to accord the immunities set out in that agreement. (HL Debs., vol. 474, col. 134: 29 April 1986)

In the course of a debate on the subject of the report of the House of Lords Select Committee on the European Communities on the privileges and immunities of Members of the European Parliament, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

At present MEPs’ privileges and immunities are laid down in a protocol signed

by the member states in 1965 and to which the United Kingdom subscribed as part of the legal framework of the Community by its ratification of the Act of Accession in 1972. Members of the European Parliament currently enjoy three types of immunity under the 1965 protocol. First, under Article 8, their freedom of movement when travelling to or from a place of meeting of the Parliament cannot be hindered by an administrative or other restriction. They also have certain special customs and exchange control facilities which, in the Select Committee's judgment, add little to the general freedom from such controls enjoyed by all Community citizens.

Secondly, MEPs' freedom of expression: under Article 9, MEPs are protected from any form of inquiry, detection or legal proceedings in respect of opinions expressed or votes cast in performance of their duties. Thirdly, under Article 10, MEPs enjoy immunity from detection and legal proceedings outside their own country and, insofar as their national MPs enjoy such immunity, within it.

(Ibid., vol. 482, cols. 508-9: 25 November 1986)

Part Three: II. A. 2. (b). *Subjects of international law—international organizations—in general—participation of States in international organizations—suspension, withdrawal and expulsion*

(See also Part Three: II. A. 1. (c), above)

In reply to a question on the subject of the UK's announcement of its withdrawal from UNESCO, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Since the announcement of our decision not to rescind our notice of withdrawal from UNESCO we have received no communications from the secretariat. We have initiated exchanges with the secretariat about the maintenance of observer status for the United Kingdom with the organisation. We have also begun discussion of the financial aspects of our withdrawal, particularly in relation to our wish to continue to support certain intergovernmental scientific activities conducted under UNESCO auspices. Since our domestic legislation giving privileges and immunities to UNESCO staff lapsed automatically on withdrawal, we have informed the secretariat that we shall consequently be withholding from UNESCO the benefits of the convention on the privileges and immunities of the specialised agencies of the United Nations.

(HC Debs., vol. 90, Written Answers, cols. 145-6: 21 January 1986)

In the course of a debate on the subject of withdrawal from UNESCO, the Minister of State for Defence Support, Lord Trefgarne, stated:

Following our withdrawal from UNESCO, we have closed our permanent delegation in Paris. We have established within our Paris Embassy a small section whose function it will be to act as a channel of communications with the organisation and to monitor future developments. We have submitted to the director general a request for observer facilities. Meanwhile, our officials continue to attend meetings of groups which include our European partners and Commonwealth friends, and remain in touch with members of the secretariat.

(HL Debs., vol. 471, col. 1221: 27 February 1986)

Part Three: II. A. 3. *Subjects of international law—international organizations—in general—legal effect of acts of international organizations*

(See also Part Two: VIII. (item of 22 August 1986, paragraph 8), above and Parts Three: III. D. (item of 7 May 1986) and Thirteen: I. D. (item of July 1984), below)

Speaking on behalf of the twelve Member States of the European Community in explanation of vote in the Third Committee of the General Assembly of the UN on the subject of the elimination of racial discrimination, the UK representative, Ms E. Young, stated on 27 October 1986:

. . . genocide is clearly defined in the Convention on the Prevention and Punishment of the Crime of Genocide. We do not accept that a resolution adopted by this Assembly can purport to extend that definition, or the area of application of that Convention. Only the States Parties to the Convention or the appropriate international organs are competent to pronounce on its interpretation.

(Text provided by the Foreign and Commonwealth Office; see also A/C.3/41/SR. 25, pp. 6-7)

Speaking in the UN General Assembly on 27 October 1986 on the subject of a resolution concerning the establishment of a zone of peace and co-operation in the South Atlantic, the UK representative, Mr J. Birch, stated:

The United Kingdom welcomes this resolution and commends Brazil for its initiative: we will therefore vote for it.

The establishment of a zone of peace for the South Atlantic region—which we understand will consist of the South Atlantic Ocean between Africa and South America not already covered by treaty—may make an important contribution to, and—as the resolution says—strengthen, the peace and security of the South Atlantic. We, along with other States of the region, are concerned for the peace and security of the South Atlantic. This is well known and has been demonstrated in various ways including our ratification of the protocols to the Treaty of Tlatelolco. The resolution does not, of course, affect our rights and obligations under those protocols, other treaties or general international law. Nor does it affect our attitude to certain of the resolutions referred to in operative paragraph 5.

Another object of the resolution—as expressed in its preamble—is the promotion of the principles and purposes of the United Nations. This must surely be so, although the resolution cannot of course affect Member States' rights and obligations created or recognised by the Charter or other basic texts such as the covenants.

(Text provided by the Foreign and Commonwealth Office; see also A/41/PV. 50, p. 41)

Part Three: II. B. 1. *Subjects of international law—international organizations—particular types of organizations—universal organizations*

In response to a complaint by the USSR to the Secretary-General of

the UN that the USA had made an illegal demand for a reduction in the number of the staff of the USSR Permanent Mission to the UN in New York, the following statement was made on 13 March 1986 in the UN Committee on Relations with the Host Country by Mr D. M. Edwards, the UK representative:

The UN does not exist to provide a haven for inadmissible activities. Those who abuse the hospitality of our organisation and of the host country abuse us all and damage the standing and reputation of the United Nations as a whole.

As the United Kingdom has had painful and costly experience of inadmissible acts by people enjoying diplomatic immunity, my delegation have listened with particular care to the statements by the distinguished Representatives of the Soviet Union and the United States. We have also read the Note Verbale of the Soviet Union, circulated under cover of document A/41/207 of 11 March. Common sense, as I shall explain, must dictate that no country has the right to expand its Representation way beyond any reasonable and justifiable level. And that is clearly what has happened in the case in question.

In its note verbale the Soviet Union describes the US action as being arbitrary and as constituting a flagrant violation by the United States of the obligation it undertook as Host Country, to ensure the necessary conditions for the normal functioning of the United Nations and the unhampered participation in its work of the States Members of the Organisation. Let us examine these arguments for a moment. First, as to the alleged arbitrary nature of US action, we do not see how this could be the case. Arbitrary action means action based on random choice or impulse, not on reason. We find it difficult to see how the Soviet Union can say that their Mission to the United Nations has somehow been singled out by the United States at random; out of a hat, as it were. We have heard the facts this afternoon from the distinguished representative of the United States. This is not a new problem. The numbers of people in the Missions of the Soviet Union have over the years climbed to levels higher than the combined numbers of the next two largest Missions added together. A cursory glance also at the size of some other Missions, including my own country's Mission, tells one immediately something important about the current numbers in the Soviet Mission.

The second limb of the complaint by the Soviet Union as set out in its note verbale of 11 March is that the action by the United States 'constitutes a flagrant violation by the United States of the obligation it undertook, as the Host Country of the United Nations Headquarters, to ensure the necessary conditions for the normal functioning of the United Nations and the unhampered participation in its work of the States Members of the Organisation'. But the Soviet Union unfortunately does not go on to say precisely why it believes that the United States is in breach of its international legal obligations. The Soviet note mentions the Headquarters Agreement of 1947 and some other unspecified international agreements, but there is no attempt to be specific or to single out particular provisions that the Soviet Union believes have been violated by the United States. Nor is it good enough for the Soviet Union to let its argument rest on the kind of point it makes in the third paragraph of its note verbale that nothing in any existing international agreements, including the 1947 Headquarters Agreement, gives the United States Government the right to impose numerical

limits on the staff of Missions of States Members to the UN. My delegation believes that this is not the correct way to approach the question. We have carried out a careful review of the relevant international agreements including the Headquarters Agreement of 1947, the Convention on the Privileges and Immunities of the United Nations of 1945, the Vienna Convention on Diplomatic Relations of 1961 and other international instruments that bear on the matter. Nowhere have we found provisions that could be said to be inconsistent with the action taken by the United States. On the contrary, our interpretation of section 15 of the Headquarters Agreement is that it addresses the question of numbers and allows the Host Government to set limits. Indeed, Mr Chairman, we would have been astonished if we had. Can it seriously be contended that, as a matter of law or practice (or indeed common sense), Member States of the United Nations are free to send unlimited numbers of people to staff their Missions to the Organisation? Of course not, Mr Chairman. On the contrary, it is quite clear that the size of a country's Mission should be determined by what is reasonably necessary to enable that country to carry out its normal functions vis-à-vis the Organisation in question and to take care, in an efficient and reasonable manner, of its legitimate interests in the working of the Organisation. That kind of test is bound, by the application of logic, to produce some kind of reasonable ceiling to the numbers of staff who may be present in a Mission. We were particularly interested to hear in this connection, the distinguished representative of the United States refer to the UN Secretariat's study of 1967, prepared for the 19th Session of the International Law Commission, in which it was clearly recognised that an upper limit must be assumed to exist. That has to be right, Mr Chairman, and to argue otherwise is, quite frankly, absurd.

(Text provided by the Foreign and Commonwealth Office; see also UN Press Release HQ/469, pp. 7-8)

Part Three: III. D. *Subjects of international law—subjects of international law other than States and organizations—mandated and trust territories, Namibia*

In the course of a debate on the second reading of the UN (Namibia) Bill, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

Britain did not have special responsibility for the League of Nations mandate on Namibia. In 1920 this was accepted by Britain, 'for and on behalf of the Government of the Union of South Africa'. As South Africa was, in practice, an independent and sovereign state by 1920, recognised formally as such in 1926, the United Kingdom did not, even at its inception, have any responsibility for the mandate. It is important to know and to establish that fact.

Successive British Governments have been involved in international efforts to end South Africa's unlawful occupation of Namibia. As a member of the Western Contact Group, we helped to draw up and to negotiate the United Nations plan for Namibian independence. This plan, endorsed by the United Nations Security Council Resolution 435, remains the only basis for indepen-

dence that has the support of all parties concerned and of the international community. We remain fully committed to it.

We shall continue, through the representations of our embassy in South Africa and in our public statements, to urge the South African Government to put the United Nations plan into force without delay and without preconditions. We shall insist that it offers the only internationally accepted solution, that there is no viable alternative to genuine independence for Namibia and that any unilateral transfer of power that might take place now or in the future to bodies established by the South African Government would be totally unacceptable. In our view, the establishment of the so-called Transitional Government of National Unity in Windhoek by the South African Government last year in no way changes the fact that South Africa has given to the international community a formal commitment to implement the United Nations plan and to bring Namibia to internationally recognised independence. We shall continue to remind the South African Government of that commitment and to put its good faith to the test.

First, Resolution 276 of 1970 (Schedule 1 of the Bill) reaffirms Resolution 2145 (XXI) of 1966 of the United Nations General Assembly in which the United Nations decided that the mandate for South-West Africa was terminated and assumed direct responsibility for the territory until its independence. The United Kingdom abstained on this resolution because of doubts as to its validity. These doubts were confirmed by the then Secretary of State for Foreign and Commonwealth Affairs, Mr. Callaghan, in 1974 when he stated in the House of Commons that we could not accept the validity of the resolution. This view has been accepted and followed by successive British governments. Acceptance of this Bill would call in doubt the position of those governments.

(HL Debs., vol. 474, cols. 805-7, *passim*: 7 May 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We do not recognise the so-called Transitional Government of National Unity and have not met with any of its representatives in their official capacity.

(HC Debs., vol. 99, Written Answers, col. 230: 11 June 1986)

In a speech made on 8 July 1986 to the International Conference for Immediate Independence of Namibia, held in Vienna, the UK representative, Mr M. Wilmshurst, stated:

I have the honour to speak on behalf of the twelve Member States of the European Community, some of whom are participating in this Conference fully and some of whom are represented as observers.

...

The attitude of the twelve Member States of the Community has been made clear on a great number of occasions. The Twelve have consistently reiterated their view that the illegal occupation of Namibia by South Africa must be brought to an end. The right of the people of Namibia to self-determination and independence must be exercised through free and fair elections under the supervision and control of the United Nations in keeping with the provisions of the settlement plan set forth in Security Council Resolution 435 (1978). This plan has been accepted both by the Government of South Africa and the South

West Africa Peoples Organisation (SWAPO) and provides for the peaceful transition of Namibia to internationally recognised independence. It embodies the only universally accepted framework for a peaceful transition to independence in a manner which is guaranteed by the UN to be free and fair. It is essential that South Africa should refrain from subordinating the application of Security Council Resolution 435 (1978) to the fulfilment of conditions which are extraneous to the problem, and cease now its illegal occupation of the territory so that the Namibian people can freely exercise their right to self-determination. The Twelve do not accept that the settlement plan should be delayed or set aside for extraneous reasons or for arrangements inconsistent with Resolution 435 (1978).

It is a cause for deep regret that South Africa's illegal occupation of Namibia in defiance of Security Council Resolution 385 (1976) continues and that hopes for a peaceful solution remain as yet unfulfilled. In this context the Twelve particularly regret the decision of the South African authorities to establish a so-called interim Government in Namibia in violation of the explicit provisions of Security Council Resolution 435 (1978). The Twelve consider as null and void the measures taken by Pretoria and categorically reject its unilateral internal settlements. The eventual subsequent decisions by the de facto administering authorities can have no effect on the United Nations plan.

(Text provided by the Foreign and Commonwealth Office)

In the course of a speech in the Third Committee of the UN General Assembly on 27 October 1986, the UK representative, Ms E. Young, stated:

The people of Namibia should be able to exercise its inalienable right to self-determination by means of free election under United Nations supervision, in accordance with Security Council resolution 435.

(A/C. 3/41/SR. 25, p. 14)

Part Three: III. F. *Subjects of international law—subjects of international law other than States and organizations—miscellaneous*

(See also Part Thirteen: I. D. (item of July 1984), below)

In a speech in explanation of vote in the Sixth Committee of the UN General Assembly on 18 November 1986, the UK representative, Mr D. M. Edwards, referred to a draft resolution on the subject of observer status of national liberation movements recognized by the Organization of African Unity and/or by the League of Arab States. He continued:

We have noted that a new final preambular paragraph has been added to the draft resolution contained in L. 4. This claims that many States have recognized national liberation movements and have granted them facilities, privileges and immunities. Although this may be a correct statement insofar as it goes, the preamble should also have reflected the equally important fact that many States which host international meetings do not accord national liberation movements facilities, privileges or immunities.

My delegation would also wish to point out that the 1975 Convention applies

only to States. Entities other than States cannot be placed on an equal footing with the Government of a State, because they are not in a position to provide all the guarantees of good conduct which a host State has the right to demand of representatives. My delegation believes that the call upon States, contained in the Resolution, to accord to delegations of national liberation movements any functional privileges and immunities is not justified. We believe that host States have as much right as other States to follow the practice generally accepted in international law with regard to privileges and immunities.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/41/SR. 47, p. 12)

Part Four: I. *The individual (including the corporation) in international law—nationality*

The Minister of State, Home Office, Mr David Waddington, made the following observations in a debate on the subject of a draft Order in Council to implement the nationality provisions of the Hong Kong Act 1985:

Article 4 sets out the way in which the new status of British National (Overseas) may be acquired by those who will cease to be British dependent territories citizens in 1997. The terms of the United Kingdom memorandum associated with the joint declaration provide that this status will be acquired by such persons only if they hold or are included in a passport showing the new status issued before 1 July 1997 or before the end of 1997 in the case of persons born in the first six months of that year. Under the terms of the agreement, therefore, it will not be transmitted to descendants born after 30 June 1997.

All Hong Kong British dependent territories citizens will be entitled to acquire BN(O) status. Acquisition will be by registration. This is consistent with the long-standing provision in British nationality law for those exercising an entitlement to citizenship, but the terms of the memorandum, reflecting the particular needs of Hong Kong, link its acquisition to the holding of a BN(O) passport. The passport, together with the central register which will be maintained, will be evidence of the new status so article 4 provides a clear entitlement to hold a BN(O) passport.

(HC Debs., vol. 89, col. 1270: 16 January 1986; see also HL Debs., vol. 470, cols. 71–5: 20 January 1986 and *ibid.*, vol. 473, cols. 269–70: 24 April 1986)

In moving the approval of the draft Hong Kong (British Nationality) Order 1986, the Secretary of State for the Home Department, Mr Douglas Hurd, stated in part:

... we should ensure that people settled in Hong Kong can continue to have the right to live there. No form of British nationality can guarantee this after 1997. It has been secured, however, through the agreement with the Chinese. That guarantees rights of abode in Hong Kong for all non-ethnic Chinese who have made it their permanent home. The agreement is binding in international law and, to make it binding in local law, the provisions are to be written into a basic law governing the Hong Kong special administrative region.

Our proposals fully meet our commitments to provide all British dependent

territories citizens in Hong Kong with the right to a home, with a clear form of nationality and with assurances for their children and grandchildren.

To go further and grant British citizenship in the way suggested, would take the problem out of the immediate context of Hong Kong and risk setting up pressures and uncertainties which could only have damaging and undesirable consequences elsewhere. We must remember that there are about two million British overseas citizens in various parts of the world, of whom about 800,000 have that as their only form of citizenship. We must think of the message which they might receive, and the doubts and uncertainties which would be raised, if we were to accept that British overseas citizenship was not adequate for some people in Hong Kong.

We must also take into account the sensible principle of the British Nationality Act, which the House approved in 1981, that British citizenship should reflect a person's close personal links with the United Kingdom. And, as British citizenship carries with it the right to come and settle in this country, we must think of our commitment to a fair and firm immigration policy. There are at present about 11,500 people in Hong Kong who in 1997 might seek to benefit under the statelessness provisions, and we do not know what might have affected the size of the commitment by then.

(HC Debs., vol. 97, cols. 656-7: 13 May 1986)

Later in the debate, the Secretary of State remarked:

We cannot accept . . . that a form of British nationality that does not carry with it a right of abode in Britain is not a genuine form of nationality. British overseas citizens are not stateless. They travel round the world on British passports. They are entitled to British consular protection. To accept that they are stateless is to accept that we have a continuing obligation to accept no fewer than 2 million BOCs living throughout the world.

(Ibid., col. 674)

In the course of a debate in the House of Lords on the subject of Hong Kong ethnic minorities, the Parliamentary Under-Secretary of State, Home Office, Lord Glenarthur, stated:

It is quite wrong to suggest that British Overseas citizenship and the status of British National (Overseas) are not effective forms of nationality. British overseas citizenship is a recognisable British nationality status. Its holders may travel on British passports, and are entitled to British consular protection in third countries. There are about 2 million British overseas citizens throughout the world, as I have said, of whom something over 200,000 have no other nationality. They are by definition former citizens of the United Kingdom and colonies who did not have the right of abode in the United Kingdom.

The British Nationality Act 1981 in no way altered this position. In its discussions of the British Nationality Act 1981 Parliament approved British Overseas citizenship as an appropriate nationality status for these people whose sole connection was with a former dependency. Parliament similarly approved the provision of British Overseas citizenship as a means of preventing statelessness. British National (Overseas) status was also approved by Parliament in discussion of the Hong Kong Act 1985.

By challenging the provisions of the draft order on the grounds that neither British National (Overseas) nor British Overseas citizenship is an effective form of nationality, those who do so are really seeking to attempt to re-open questions which Parliament has already considered, and considered fully and decided.

I should like now to turn to the matter of right of abode raised particularly by the noble Lord, Lord Kennet, and referred to also by my noble friend Lady Macleod. I rather thought from what the noble Lord, Lord Kennet, said that he was under some misapprehension. In asking how does the agreement grant a guaranteed right of abode in Hong Kong for non-ethnic Chinese BDTCs it is important to say that Section 14 of Annexe 1 to the joint declaration guarantees right of abode in Hong Kong after June 1997 for non-ethnic Chinese who have been ordinarily resident in Hong Kong for seven years or more and have taken it as their place of permanent residence either before or after the establishment of the Hong Kong special administrative region on 1st July 1997; persons under 21 years of age who were born of such persons in Hong Kong (again before or after 1st July 1997); and any other persons who have the right of abode only in Hong Kong before 1st July 1997. As I have said, this covers all non-ethnic Chinese BDTCs in Hong Kong unless they had left Hong Kong permanently and have the right of abode elsewhere.

My noble friend Lady Macleod asked whether the non-ethnic Chinese rights of abode in Hong Kong would be incorporated in the law of the special administrative region. The answer is, yes. The provisions of the agreement with China are already binding in international law, as I made clear earlier. They will be written into a basic law governing the Hong Kong special administrative region. I hope that to that extent she is reassured. As I said in my opening remarks, the BDTCs who are not ethnic Chinese have made plain—this has been stressed by others of your Lordships who have spoken today—that they want to continue to live and work in Hong Kong and to have a citizenship status that will allow them to continue to travel to other countries.

Later in his remarks, Lord Glenarthur stated:

My noble friend Lady Vickers and the noble Lord, Lord Cledwyn, both raised comparisons between Hong Kong, the Falkland Islands and Gibraltar. To deal with the Falkland Islanders first, it is not appropriate to draw a comparison. Over three-quarters of the Falkland Islands population of 1,800 automatically became British citizens as well as British Dependent Territory citizens on 1st January 1983 because they had the right of abode in the United Kingdom. The remaining 400 or so became British Dependent Territory citizens only in accordance with the general principles of the British Nationality Act 1981. Nevertheless, the Government did not seek to resist the Bill of my noble friend Lady Vickers, but we made it very plain that we considered the Falkland Islands situation to be unique and that the grant of British citizenship to them was not to be taken as a precedent for other dependent territories. This view was generally accepted by most of your Lordships at the time. . . .

Similarly, with Gibraltar it is not appropriate to draw a direct comparison. Under the British Nationality Act 1981 Gibraltarians became British Dependent Territory citizens on 1st January 1983. However, a number of your Lordships have argued, as I said, that there was a clear distinction to be drawn between Gibraltarians and other British Dependent Territory citizens and, in particular,

Hong Kong. The Gibraltarians were already United Kingdom nationals for European Community purposes, and had rights of movement, travel and work in the European Community area which other dependent territory citizens did not have. The provision proposed for the Gibraltarians was not therefore seen as a precedent for other dependent territories because, unlike the Gibraltarians, they did not already have any rights to enter and work in this country. Again, Parliament accepted the special nature of Gibraltar's case as a member of the European Community, and agreed to the amendment.

My noble friend Lady Vickers also raised this afternoon the matter of the acceptability of BN(O) passports to third countries. I am sure that many of your Lordships will understand the force of the concern she expressed. The freedom to travel is a matter of considerable importance to the people of Hong Kong, of course. The Government will do all they can to ensure that once the order is in place BN(O) passport holders enjoy the same access to other countries as is enjoyed at present by BDTC passport holders.

(HL Debs., vol. 474, cols. 1431-5, *passim*: 16 May 1986)

Part Four: V. *The individual (including the corporation) in international law—statelessness, refugees*

(See also Part Four: I., above and Part Six: II. B. (item of 1 October 1986), below)

The Minister of State, Home Office, Mr David Waddington, made the following observations in a debate on the subject of a draft Order in Council to implement the nationality provisions of the Hong Kong Act 1985:

I come next to the article dealing with statelessness. The joint declaration guarantees to all those B[ritish] D[ependent] T[erritories] C[itizen]s, except those who have left Hong Kong permanently and have the right of abode elsewhere, the right of abode in Hong Kong from 1 July 1997, and the Order in Council gives all Hong Kong BDTCs the right to register as B[ritish] N[ationals] (O[verseas])s. During the passage of the Hong Kong Bill a number of Members were concerned that those British dependent territories citizens in Hong Kong who were not ethnically Chinese, and their children, might be left stateless in 1997 because they would not be regarded as Chinese nationals. The Government recognised that concern and gave a firm undertaking that no former Hong Kong British dependent territories citizen, nor any child born after June 1997 to such a person, would remain stateless as a result of the agreement. During the Committee Stage of the Bill in another place, this undertaking was extended to cover the grandchildren of former Hong Kong British dependent territories citizens if they were born stateless.

Our proposals to deal with that undertaking are set out in article 6. It provides that any former Hong Kong British dependent territories citizen who for any reason has not acquired the BN(O) status to which he is entitled and would otherwise be stateless in 1997 will automatically become a British overseas citizen on 1 July of that year. Any of their children born after June 1997 if they would otherwise be stateless, will also acquire British overseas citizenship at birth, and

any of their grandchildren, if born stateless, will be entitled to be registered as British overseas citizens.

...
The whole point of article 6 is to make provision, [that where] otherwise there would be statelessness because of article 6, there will not be statelessness. If a non-Chinese ethnic person chooses for some reason not to apply for BN(O) status before 1 July 1997—he is, of course, entitled to apply for it—then, as distinct from ethnic Chinese inhabitants of Hong Kong, he will not automatically become a Chinese citizen. Therefore he could, if he had no other nationality, be stateless—hence article 6 in furtherance of the undertakings given to the House automatically to give such a person the status of British overseas citizen. I shall come back to this in more detail, because it is one of the most important matters under discussion.

Non-Chinese ethnic BDTCs will be entitled to BN(O) status, but if for any reason they do not become BN(O)s, they will have a recognised nationality status, and so will their descendants until well into the middle of the next century.

(HC Debs., vol. 89, cols. 1270-1: 16 January 1986; see also HL Debs., vol. 470, cols. 72-3: 20 January 1986)

In reply to oral questions, the Minister of State, Home Office, Mr David Waddington, stated:

... the Chinese Government have confirmed that non-Chinese who meet the legal requirements under the Chinese nationality law may apply for Chinese nationality and that such cases will be dealt with by the appropriate authorities. Giving the non-ethnic Chinese British citizenship would not secure for them what they want—the right of abode in Hong Kong. They will not be left stateless. All British dependent territory citizens will be entitled to BNO status, and those who do not apply and have no other nationality will become BOCs, a status which will also be available to their children and grandchildren.

... I repeat that no one will be left without a citizenship. Those who are now BDTCs will be able to apply for the new status of BNO. If they do not apply, again they will not be left without citizenship because they will be entitled to BOC status.

(HC Debs., vol. 96, cols. 408-9: 24 April 1986; see also HL Debs., vol. 473, cols. 1269-70: 24 April 1986)

In the course of a debate in the House of Lords on the subject of British citizenship in Hong Kong, the Parliamentary Under-Secretary of State, Home Office, Lord Glenarthur, stated:

... the Government received and considered very carefully representations from the [Council of Hong Kong Indian Associations] that British citizenship should be granted to those British Dependent Territories citizens who are not ethnically Chinese and who would otherwise be stateless in 1997. But as my right honourable friend the Home Secretary announced on 23rd April, we have concluded that it would not be right to grant this request. The arrangements we have made guarantee people's continued right to live in Hong Kong and will

ensure that neither they, their children nor their grandchildren need fear statelessness.

...

... British citizenship does not properly reflect the position of the ethnic minorities in Hong Kong, nor can it secure their position there. Their future in Hong Kong can be secured . . . only by the agreement with the Chinese Government and this guarantees them the right to live in Hong Kong. All British Dependent Territories citizens connected with Hong Kong will up to July 1997 have the right to be British Nationals (Overseas), but any who do not do so, or whose children or grandchildren later risk statelessness, can become British overseas citizens. This properly reflects their position in Hong Kong. It would be wrong to treat them differently from the many thousands of other British overseas citizens throughout the world, and that is not necessary in order to give them what they say they want. The two things they say they want are an accepted nationality status and a home in Hong Kong, both of which they have.

...

... of course we appreciate the concerns of the minority communities who are not ethnically Chinese. There is no question of any British Dependent Territories citizen becoming stateless as a result of the agreement. The draft order makes provisions to prevent this, not only for those who were British Dependent Territories citizens before 1st June 1997, but also for their children and their grandchildren born on or after that date. That is fully in accordance with our international obligations to relieve statelessness.

(HL Debs., vol. 474, cols. 584-6 *passim*: 6 May 1986; see also *ibid.*, cols. 1397-9: 16 May 1986)

In moving the approval of the draft Hong Kong (British Nationality) Order 1986, the Secretary of State for the Home Department, Mr Douglas Hurd, stated in part:

We considered long and hard the third request—that British citizenship should be granted to British dependent territories citizens who were not ethnically Chinese and who might risk statelessness after 1997. We accept fully our commitments to this community, and we intend to honour them in full, but we must also consider the implications of going as far as they have asked. We believe that such a step is not necessary to provide them with the proper measure of security they need, and that it would carry considerable implications in the years ahead which we could not responsibly ignore.

We have approached the problem with two firm principles in mind. The first is that no British dependent territories citizen should have any reason to fear becoming stateless in 1997; nor after 1997 should their children, or their grandchildren. The provision of British overseas citizenship for any who would otherwise be stateless because they have not taken up their right to be a British national (overseas), and the assurances of British overseas citizenship for the children and grandchildren of British dependent territories citizens, fully meet these commitments.

(HC Debs., vol. 97, col. 656: 13 May 1986)

In reply to a question, the Minister of State, Home Office, wrote:

All applications for asylum are carefully considered on their individual merits in accordance with our obligations under the 1951 convention relating to the status of refugees. Unwillingness to perform military service is not generally regarded as of itself justifying refugee recognition.

(Ibid., vol. 100, Written Answers, col. 372: 30 June 1986)

In reply to a question on the subject of Iranian asylum seekers, the Minister of State, Home Office, wrote in part:

Liability to conscription is not recognised under the United Nations convention on refugees as a basis for refugee status and we do not regard it as grounds for the grant of exceptional leave.

(Ibid., vol. 107, Written Answers, col. 351: 15 December 1986)

Part Four: VI. *The individual (including the corporation) in international law—immigration and emigration, extradition, expulsion and asylum*

In reply to a question, the Parliamentary Under-Secretary of State, Home Office, wrote:

Arrangements among European Community countries already provide for the extradition of convicted terrorists. The Council of Europe convention on the suppression of terrorism also provides that fugitives accused or convicted of certain serious offences may not avoid extradition by claiming that their offences were political. We shall continue to press for the broadest application of that convention by our European partners. In addition, the United Kingdom has ratified the Council of Europe convention on the transfer of sentenced prisoners, which enables foreign prisoners to serve their sentences in their own country. This convention is open to all European Community countries, and a draft agreement among member states is at an advanced stage of preparation. We have previously explained that public policy considerations may cause us to refuse the transfer of a terrorist or any other prisoner who had been convicted of particularly horrific crimes.

(Ibid., vol. 94, Written Answers, col. 539: 27 March 1986)

In reply to a question, the Parliamentary Under-Secretary of State, Home Office, wrote:

The Tokyo Convention Act 1967 gave effect to that convention in United Kingdom law. The Hague and Montreal conventions were implemented respectively through the Hijacking Act 1971 and the Protection of Aircraft Act 1973, both of which have since been repealed and their provisions consolidated into the Aviation Security Act 1982. Orders have been made under these Acts and under the Extradition Act 1870 making the offences referred to in the conventions extraditable in respect of the contracting parties to the conventions. The Chicago convention, which the United Kingdom ratified in 1947, contains no provision for extradition.

(Ibid., vol. 97, Written Answers, col. 397: 13 May 1986)

In the course of a speech given to the American Bar Association in Washington on 30 June 1986, the Attorney-General, Sir Michael Havers, stated:

I shall quickly acknowledge that the United Kingdom has itself been hampered in the development of our extradition arrangements by the dogma of the past. There are aspects of our extradition law and practice which do not fit easily with many of the countries with whom we have relations. Indeed I have to say that the UK is widely regarded as one of the most difficult of the industrialised countries from which to secure the extradition of an alleged offender. A growing awareness of this problem led us to undertake a radical review of our extradition law generally and we have concluded that changes must be made. We intend therefore to remove in future from extradition treaties the list of extraditable offences and to abolish the so-called '*prima facie* requirement' which obliges the requesting State to establish a *prima facie* case against the fugitive according to English rules of evidence. This we hope will make the whole process of extradition easier and in this way to strengthen our co-operation with other countries against crime.

(Text provided by the Foreign and Commonwealth Office)

In reply to a question in the House of Lords, the Parliamentary Under-Secretary of State, Home Office, Lord Glenarthur, stated:

... the Government's priority is to improve our extradition arrangements with those countries with which we have regular extradition traffic. We have published proposals for the reform of our extradition law that would bring us closer to the practices followed by our European partners and enable us to accede to the European Convention on Extradition. In the case of those countries with which we have no extradition treaty and potentially little extradition traffic, we propose to adopt new powers to extradite on an *ad hoc* basis, as necessary. We have no present plans for entering into new bilateral agreements.

...
The new treaty with Spain comes into force today and replaces the former treaty that the Spanish denounced in 1978. We look forward to working closely with Spain to make a success of the new treaty in the way that my noble friend hopes. As for the United States supplementary treaty, again we are pleased that that treaty has obtained the support of a substantial majority in the Senate Foreign Relations Committee. The treaty represents an important advance in ensuring that those who have committed crimes of violence cannot evade justice by claiming that their crimes were political.

... the Extradition Act 1870 certainly does not meet modern conditions. The huge expansion in recent years in international crime, such as drug trafficking, fraud and terrorism, has presented new challenges that our extradition arrangements must meet. Hence the need for the changes. So far as concerns new bilateral agreements, as I said in my original Answer, we do not have plans to enter into any new agreements, but I am sure that should any particular change be needed in the light of the legislation that it is to be hoped will follow, that view will be taken into account.

(HL Debs., vol. 477, cols. 755-6, *passim*: 1 July 1986)

On 19 and 20 August 1986, the Governments of the UK and the US concluded an Exchange of Notes amending the Supplementary Treaty of 25 June 1985 concerning the Extradition Treaty of 1972. Article 1 of the Supplementary Treaty as amended reads as follows:

For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character:

- (a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;
- (b) murder, voluntary manslaughter, and assault causing grievous bodily harm;
- (c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;
- (d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person; and
- (e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.

(Cmnd. 9915)

In moving the approval of the draft Suppression of Terrorism Act 1978 (Application of Provisions) (United States of America) Order 1986, the Minister of State, Home Office, the Earl of Caithness, stated in part:

The House will be aware that the purpose of this order is to apply the provisions of the Suppression of Terrorism Act 1978 to the United States. This will open the way for the United Kingdom to ratify the new Supplementary Extradition Treaty with the United States. The amended text of that supplementary treaty is set out in Schedule 1 of the draft order. An exchange of notes between the two governments, giving the text, was laid before your Lordships' House and the other place last month. The main effect of the supplementary treaty will be to prevent people accused or convicted of certain serious crimes of violence from avoiding extradition by claiming that their offences are political. As your Lordships will know, people accused or even convicted of serious violent offences in the United Kingdom have been able to flee to the United States and avoid extradition by claiming that their offences were political.

It may be helpful if I seek to explain first some of the terms of the draft order before us this evening, and then turn to the supplementary treaty itself. The draft order has been considered by the Joint Committee on Statutory Instruments. Before the United Kingdom can ratify the supplementary treaty the necessary statutory provisions have first to be applied. Thus the draft order applies certain provisions of the Suppression of Terrorism Act 1978 in respect of extradition to the United States. That statute gave effect to the European Convention on the Suppression of Terrorism. The present arrangements with the United States reflect some of the terms of the European Convention which, among other things, seeks to remove the political offence exception from

extradition in respect of certain violent crimes. The European Convention also contains other provisions which have not been included in the supplementary treaty. Thus it obliges participating states to establish extraterritorial jurisdiction over offences where extradition does not take place. But that would be outside the terms of our principal extradition treaty with the United States; nor would it be a particularly appropriate facility for two common law states. It has not therefore been included in the supplementary treaty. The Suppression of Terrorism Act is applied by order to other states which have ratified that convention. It has been so applied over the years to all the European states which have ratified. The United States would be the first country outside the Council of Europe to be designated.

The draft order, in Schedule 2, identifies the various provisions in the 1978 Act which give effect to the provisions of the supplementary treaty. In particular I draw your Lordships' attention to paragraph 5 of that schedule. This sets out the list of offences—drawn from the list in the 1978 Act—which are not to be regarded as offences of a political character in relation to a request for the extradition of a person to the United States. All the major terrorist offences are covered in the list which includes murder, manslaughter, kidnapping and explosives offences.

The supplementary treaty does not extend the range of offences which are extraditable under our principal extradition treaty with the United States. The principal treaty sets out in the normal way the list of crimes for which extradition takes place, and to that extent remains unamended. The principal treaty however incorporates a further requirement of the Extradition Act 1870: the political offence exception. This requirement is a standard feature of our extradition treaties. Thus the principal United States treaty prevents extradition: 'if the offence for which extradition is requested is regarded by the requested party as one of a political character'. This concept is not defined in either the 1870 Act or in the treaty. In the United States a body of case law has arisen concerning the interpretation of this exception. The effect of this has been that the United Kingdom has failed to secure the extradition of people accused or even convicted of serious offences simply on the ground that the US court had to accept that their political motives prevented extradition. It may be helpful to the House if I gave an example.

In one particular case the United Kingdom applied for the extradition of a man to face a charge of attempted murder as a result of causing an explosion at an army barracks in 1974. In this incident a bomb exploded in the canteen of a barracks in Ripon and a civilian canteen manageress was injured by flying glass. The fugitive in fact admitted involvement in the incident. Following consideration of the United Kingdom's request a San Francisco court ruled that the alleged offence was political and rejected the request.

Neither the United States nor the United Kingdom accept that this state of affairs represents a proper application of the political offence safeguard. It is deeply offensive to ordinary law abiding people to see criminals accused of such vicious offences find haven in another country, particularly a country with which we have such close and friendly relations. The purpose of this safeguard must surely relate to asylum. But where both countries are democracies and have independent judiciaries it cannot be right for people accused of such crimes so easily to escape justice.

I turn now to the content of the supplementary treaty. The present text of course differs from that which was signed by representatives of the two governments in June 1985. The amendments were made following lengthy proceedings in the Senate Foreign Relations Committee, with which the United Kingdom was kept closely in touch.

The most important changes relate to the list of offences and to the inclusion of a safeguard. The effect of the supplementary treaty is that a person accused or convicted of any of the offences in the list in Article 1 of the supplementary treaty would not be able to avoid extradition by claiming that his offence was politically motivated. Some of the offences on the original were removed. For example, there were difficulties with some of the firearms offences. It was doubted whether the descriptions of the offences would always cover conduct which actually amounted to a crime in the United States. The combination of the international terrorist offence references (for example, hijacking, hostage taking) was a matter of drafting. And possession and purely property offences were removed. The list of offences is therefore briefer. But both the United Kingdom and the United States are confident that the whole range of terrorist crime is covered.

(HL Debs., vol. 482, cols. 691-3: 27 November 1986; see also HC Debs., vol. 106, cols. 367-8: 26 November 1986)

Part Four: VII. *The individual (including the corporation) in international law—protection of human rights and fundamental freedoms*

(See also Part Eleven: II. A. 7. (a). (item of 15 December 1986) and Part Thirteen: I. D. (item of July 1984), below)

In a letter dated 7 January 1986 to the Secretary-General of the Council of Europe, the UK Government renewed its Declaration under Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, in the following terms:

I have the honour to refer to Mr Boothby's letter dated 14 January 1966 (*see* Treaty Series No. 8 (1966), Cmnd. 2894) which declared the recognition by the Government of the United Kingdom of Great Britain and Northern Ireland, in respect of the United Kingdom only, of the competence of the European Commission of Human Rights to receive petitions from persons, non-governmental organisations or groups of individuals, and to Mr Cape's letter of 1 December 1980 (*see* Treaty Series No. 11 (1982), Cmnd. 8488) which prolonged, until the 13 January 1986, the period of recognition of acceptance of the competence of the Commission in that respect.

On instructions from Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs, I now have the honour to inform you that the Government of the United Kingdom hereby renew for the United Kingdom of Great Britain and Northern Ireland the Declaration made in Mr Boothby's letter of 14 January 1966 referred to above, further prolonging the said period for a further five years, to end on 13 January 1991. Except in relation to the

date of expiry of this period, the terms of the said Declaration shall remain unaffected.

(TS No. 43 (1986) (Cmnd. 9877, p. 8))

A letter in similar terms was sent on the same day renewing the UK's Declaration under Article 46 of the above Convention (*ibid.*).

In reply to a question on the subject of the alleged use of torture against political prisoners in the Ukraine, the Minister of State, Foreign and Commonwealth Office, wrote in part:

We shall continue to press the Soviet Union to honour its international commitments on human rights under the universal declaration of human rights, the international covenant on civil political rights and the Helsinki final act.

(HC Debs., vol. 91, Written Answers, col. 422: 11 February 1986)

In a statement made in the House of Lords, the Minister of State for Defence Support, Lord Trefgarne, observed:

Implementation by the Soviet Union and Eastern European countries of their commitments under the Helsinki Final Act over the six-month period to 31st December 1985 has continued to be generally unsatisfactory. Levels of compliance have reflected the Warsaw Pact countries' selective interpretation of their commitments. There have again been widespread breaches of the provisions relating to human rights and fundamental freedoms though with variations in the pattern of implementation as between individual states.

(HL Debs., vol. 472, col. 165: 4 March 1986)

In the course of a speech on 6 March 1986 in the UN Commission on Human Rights, the UK representative, Sir Anthony Williams, stated:

. . . I must once more draw attention to the fact that in Vietnam many thousands of people remain detained without trial. They have been so detained since 1975 on an indefinite basis, in flagrant violation of the International Covenant on Civil and Political Rights, to which Vietnam has been a party since 1982. The continued detention of these people by administrative decision is outside the provisions of Vietnam's own criminal code, which came into effect on 1 January 1986.

. . .

. . . we find it difficult to reconcile the offence contained in the new criminal code of compiling, keeping or circulating documents with a 'reactionary content' with the provisions of Article 19 of the International Covenant on Civil and Political Rights to which, as I said earlier, Vietnam is now party.

(Text provided by the Foreign and Commonwealth Office; see also E/CN.4/1986/SR.46/Add.1, p. 15)

In a letter dated 17 April 1986 to the Secretary-General of the Council of Europe, the UK Government renewed its Declaration under Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, in the following terms:

I have the honour to refer to my letter dated 7 January 1986, further renewing for the United Kingdom of Great Britain and Northern Ireland the declaration made in Mr. Boothby's letter of 14 January 1966 (*see* Treaty Series No. 8 (1966), Cmnd. 2894), of recognition of the competence of the European Commission of Human Rights to receive petitions from persons, non-governmental organisations or groups of individuals. I also have the honour to refer to the letters commencing with Mr. Boothby's letter dated 12 September 1967 (*see* Treaty Series No. 98 (1967), Cmnd. 3475) and concluding with Miss Vining's letters of 19 August 1981 (*see* Treaty Series No. 11 (1982), Cmnd. 8488) containing declarations in respect of certain territories for the international relations of which the Government of the United Kingdom were responsible and renewals thereof.

On instructions from Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs, I now have the honour to inform you that the Government of the United Kingdom hereby renew, in respect of the territories for the international relations of which they are responsible, specified on the list annexed to this letter, the declaration made in Mr. Boothby's letter dated 12 September 1967, of acceptance of the competence of the Commission to receive petitions from persons, non-governmental organisations or groups of individuals by further prolonging in respect of the territories specified on that list, for the five years beginning on 14 January 1986 and ending on 13 January 1991—the period of acceptance of such competence. Except in relation to the date of expiry of this period, the terms of the declaration of 12 September 1967 shall remain unaffected.

List of territories for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland are responsible, in respect of which the declaration of acceptance of the European Commission of Human Rights to receive petitions from persons, non-governmental organisations or groups of individuals is further renewed:

- Anguilla
- Bermuda
- Falkland Islands
- South Georgia and the South Sandwich Islands
- Gibraltar
- St. Helena
- St. Helena Dependencies
- Turks and Caicos Islands.

(TS No. 64 (1986) (Cm. 23, pp. 7-8))

A letter in similar terms was sent on the same day renewing the UK's Declaration under Article 46 of the above Convention (*ibid.*, pp. 8-9).

In reply to a question on the subject of the Anglo-Irish Agreement, the Parliamentary Under-Secretary of State, Northern Ireland Office, wrote:

Under article 5(a) the Intergovernmental Conference can take an interest in measures to protect human rights and to prevent discrimination. However, it remains for the British Government to take decisions on these matters insofar as

they relate to Northern Ireland. In doing so we take account of many different views, including any expressed by the Irish Government.

(HC Debs., vol. 96, Written Answers, col. 461: 1 May 1986)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Violations of international standards for the protection of human rights are a legitimate matter of international concern, wherever they occur. We make our views known in all appropriate ways. We apply the same criteria to South Africa and Nepal.

(Ibid., vol. 99, Written Answers, col. 433: 16 June 1986.)

In reply to the question to the Prime Minister

. . . if she will list the occasions since June 1979 when the United Kingdom has been found guilty in a case before (a) the European Court of Human Rights and (b) the European Court of Justice; and what was the subsequent action taken by the United Kingdom in each case,

the Prime Minister wrote:

The information requested by the hon. Member is as follows:

- (a) Since June 1979 the European Court of Human Rights has found against the United Kingdom on eight occasions. New primary legislation, or amendments to existing regulations or administrative practice, have been introduced consequent upon seven of these judgments. The cases, together with the date of the judgment and the subsequent action taken by the Government are as follows:

Young, James and Webster (13 August 1981): Employment Act 1980, effective 15 August 1980, re-enacted and strengthened by Employment Act 1982—effective 1 December 1982;

Dudgeon (22 October 1981): Homosexual Offences (Northern Ireland) Order 1982—effective 9 December 1982;

'X' (5 November 1981): Mental Health Act 1983—effective September 1983;

Silver and others (25 March 1983): Control of prisoners' correspondence. Amendment to Prison Regulations—effective in England and Wales 1 December 1981, Scotland 1 August 1983 and Northern Ireland 1 February 1985;

Campbell and Fell (28 June 1984): Changes in the practice relating to Prison disciplinary tribunals—by means of a letter of 12 July 1984 to Chairmen of Boards of Visitors copied to Prison Governors;

Malone (2 August 1984): Interception of Communications Act 1985—effective 10 April 1986;

Abdulaziz, Cabales and Balkandali (27 May 1985): Changes to Immigration Rules on admission of husbands and wives—effective 26 August 1985;

As regards action on the one remaining case, Campbell and Cosans (25 February 1982), the hon. Member will be aware that the possibility of legislation

relating to corporal punishment in schools is the subject of discussion in Committee on the Education Bill.

- (b) Since June 1979, the European Court of Justice (ECJ) has found against the United Kingdom in 11 cases brought by the European Commission under article 169 of the EEC treaty, and in one case brought by another member state (France) under article 170 of the treaty. Details, including follow-up action, are as follows:

ECJ case number	Subject	Follow-up action
141/78†	Fisheries conservation legislation	Subordinate legislation amended.
170/78	Wine and Beer:	Legislation amended by the Finance Act 1984.
170A/78*	Tax arrangements	
32/79	Sea Fisheries:	Community regime introduced in September 1980. Revised national arrangements introduced for control of herring fishing in the Irish Sea.
804/79	Conservation Measures	Legislation amended by the Equal Pay (Amendment) Regulations 1983 (SI H83 No. 1794).
61/81	Equal pay for men and women	Legislation amended by the Importation of Milk Act 1983 and regulations thereunder.
124/81	Imports of UHT Milk	Administrative changes made.
40/82	Newcastle disease in	
40A/82*	Poultry	Amending legislation before Parliament in the Sex Discrimination Bill (HL).
165/82	Equal Treatment for men and women	Legislation amended by the Trades Description (Origin Marking) (Miscellaneous Goods) (Revocation) Order 1986 (1986/193).
207/83	Origin-Marking of retail goods	Administrative changes made.
100/84	Anglo/Polish Fishing	

* The notification 'A' is used to denote two judgments given in each case.

† Proceedings under article 170 of the EEC treaty.

In addition, under article 177 of the EEC treaty national courts may ask the European Court of Justice to give preliminary rulings in order to clarify questions of Community law. Once the European Court of Justice has answered the questions of the national court the matter returns to that court for decisions. Some preliminary European Court of Justice rulings in cases referred to it by United Kingdom courts have a bearing on United Kingdom law, which may on occasions require amendment as a result. Recent examples are the court's judgments in 152/84 *Marshall v S W Hampshire Area Health Authority*, and 150/85 *Drake v Chief Adjudication Officer*.

(*Ibid.*, vol. 100, Written Answers, cols. 527-8: 2 July 1986)

In the course of a speech in the Third Committee of the UN General Assembly on 27 October 1986, the UK representative, Ms E. Young, stated on behalf of the twelve member States of the European Community:

The Twelve had repeatedly condemned the system of apartheid which they regarded as a flagrant violation of the most basic human rights and had called for it to be abolished.

(A/C. 3/41/SR. 25, p. 7)

In the course of a speech in the UN General Assembly on 3 November 1986 to celebrate the twentieth anniversary of the adoption of the International Covenants on Human Rights, the UK Permanent Representative, Sir John Thomson, on behalf of the twelve Member States of the European Community, stated:

The Twelve seek universal observance of human rights. The Joint Declaration of 5 April 1977 by the European Parliament, the Council and the Commission stressed the prime importance we attach to human rights. Our Foreign Ministers reaffirmed this in a declaration issued in Brussels on 21 July 1986 (and circulated as document A/41/607 of this Assembly), in which they set out the principles of the Twelve in the human rights field. In this declaration they called for universal ratification of the major United Nations human rights instruments. Central among these are the two great Covenants whose adoption we are celebrating today. They proclaimed high but attainable standards for the protection and promotion of human rights, to which all states should conform. And they gave effect to the commitment in Articles 55 and 56 of the Charter to make the promotion of human rights the legitimate and continuous duty of the world community. Thus for the first time machinery was established under the auspices of the United Nations to consider the fulfilment by states of their international obligations to respect and to ensure to all individuals subject to their jurisdiction certain human rights. The Twelve again urge those countries which have not yet done so to consider ratifying or acceding to the Covenants and the Optional Protocol as soon as possible, to enable them to become truly universal.

The adoption of the Covenants and the Optional Protocol was a major achievement. But we must not rest on our laurels. Setting standards cannot protect human rights if the standards laid down are then blatantly disregarded. We are constantly reminded that human rights are still being grievously violated in very many parts of the world, even in certain countries which are party to the Covenants. Ratification is not enough.

Implementation is the essential task before us. We must be vigilant to defend essential freedoms where they exist, and make practical efforts to extend them elsewhere. States Parties to the Covenants have a legal obligation to ensure that their actions are in line with the provisions of the Covenants. And at the international level we must ensure ever greater observation of the obligations which have already been accepted. This can be done in a number of ways. It can be done by making more effective use of the machinery which already exists to monitor the implementation of the standards in the Covenants, the Human Rights Committee, and the newly established Committee on Economic, Social and Cultural Rights. Where States Parties have made the declaration provided

for in Article 41 of the International Covenant on Civil and Political Rights, there is further provision for monitoring implementation. It can also be done through the activities and procedures of United Nations bodies such as the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. All these activities need to be pursued urgently. The adequacy and effectiveness of the United Nations' machinery need also to be kept under constant review. As Sir Geoffrey Howe made clear in his speech in our general debate on 23 September, delivered on behalf of the European Community and its Member States, the Twelve attach particular importance to maintaining and strengthening the mechanisms established by the United Nations for the protection of human rights. It is essential that the necessary resources should continue to be made available for this purpose.

(Text provided by the Foreign and Commonwealth Office; see also A/41/PV. 54, pp. 9-12)

In the course of a speech to the Third Committee of the UN General Assembly on 18 November 1986 on the subject of the report of ECOSOC, the UK representative, Mr J. Birch, speaking on behalf of the twelve Member States of the European Community, stated:

I have referred to the importance the Twelve attach to the elaboration of universally accepted human rights standards. The adoption by this Assembly in 1984 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was a major advance in the setting of universal human rights standards. Although torture was already prohibited in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, those prohibitions had not proved adequate to counter the continued widespread practice of this particularly abhorrent violation of human rights. The Twelve welcome the fact that 12 states have already become party to the Convention, and we hope that further accessions and ratifications will enable it to enter into force soon. We urge all States to adhere to the Convention.

...
In line with their commitment to the promotion of human rights, our governments are all party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the earliest regional arrangement for the protection of human rights. The European Convention, which brings together the countries of Western Europe, is far-reaching, not only in its scope, but in particular in its enforcement machinery. It is in that framework that complaints of violations of human rights and fundamental freedoms in the Republic of Cyprus are being dealt with. This machinery, and the optional procedure, to which all the Twelve have acceded, recognising the right of individual petition, have enabled the European Convention to play an important part in the guaranteeing of human rights and fundamental freedoms. Our experience with the European Convention strengthens our firm conviction that ratification of human rights instruments alone is not enough. Implementation is essential.

...
In the USSR and the other states of Eastern Europe, although human rights are in theory guaranteed in their constitutions, and although they highlight their

adherence to all international human rights instruments, in practice fundamental rights and freedoms are not duly respected. This year, the 25th anniversary of the erection of the Berlin Wall, we are starkly reminded of a reality which keeps in by force people who wish to leave, sets neighbours and families apart from each other, is a total negation of the principles enshrined in the Charter and the Universal Declaration, and is irreconcilable with the provisions of the International Covenant on Civil and Political Rights.

Turning to the situation in Afghanistan, Mr Birch remarked:

... there is increasing evidence that the educational system is being based on non-traditional ideas and enforced indoctrination, contrary to Article 18 of the International Covenant on Civil and Political Rights, with children being sent abroad to be educated, against their parents' will.

Mr Birch went on:

The Twelve are also concerned about human rights violations in Vietnam. Many thousands have been detained without trial in Vietnam since 1975 on an indefinite basis, in flagrant violation of the International Covenant on Civil and Political Rights, to which Vietnam has been party since 1982. The Twelve remain disturbed by continuing reports that these detainees are subject to harsh treatment. The thousands of Vietnamese who continue each year to flee oppression in their country are a living reproach to the Vietnamese Government.

He then turned to the situation in Iran:

We reiterate once again our view that Iran is legally bound to respect the Universal Declaration of Human Rights, the International Covenants on Human Rights, and the other human rights instruments to which it is party. There can be no justification for failing to live up to these obligations.

(Text provided by the Foreign and Commonwealth Office; see also A/C.3/41/SR. 49, pp. 8-12, *passim*)

In a speech in the Third Committee of the UN General Assembly on 28 November 1986 in explanation of a vote on a draft declaration on the right to development, the UK representative, Ms E. Young, stated in part:

As regards preambular paragraph 10 and Article 6.1, my delegation has made clear on many occasions that we do not accept that human rights are indivisible and inter-dependent, although we accept that certain rights are inter-related, and that the enjoyment of some may contribute to the enjoyment of others.

...

In addition, my delegation does not accept any link between the promotion and protection of human rights and the establishment of a new international economic order.

As regards preambular paragraph 16 and Article 1.1, we have difficulty with the reference to the right to development as an 'inalienable human right' when that right is not, in the view of my delegation, satisfactorily or sufficiently defined in the text. In particular, the right to development is not clearly related in the text to the individual human person, who is the only beneficiary of human rights under the Charter and the International Covenants.

Similarly we cannot accept the reference in Article 1.1 or Article 5 to a human right of peoples. Nor can we accept the implication in Article 5 that States should act to eliminate only mass and flagrant violations of human rights. States should take steps to eliminate *all* violations of human rights.

My government is one of the largest donors of development assistance. It is clear therefore that we agree that States should take steps to achieve development, including the more rapid development of developing countries. But we cannot accept any suggestion that this should become an obligation under international law.

Finally as regards Article 8, the concept of popular participation is still under consideration by the Commission on Human Rights. My delegation understands this concept to mean 'democratic participation'.

(Text provided by the Foreign and Commonwealth Office; see also A/C.3/41/SR. 61, pp. 33-4)

Part Five: IV. *Organs of the State—diplomatic agents and missions*

(See also Part Five: VIII. A. and Part Eight: II. C. (item of 25 February 1986), below)

In reply to a question on the subject of relations with Guatemala, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

It is not normal international practice to impose preconditions on the establishment of consular or diplomatic relations.

(HC Debs., vol. 90, Written Answers, col. 145: 21 January 1986)

The following statement was issued by the Foreign and Commonwealth Office after a press conference on 28 February 1986:

Asked about rates owed by Libya and Iraq on diplomatic premises in London, Spokesman said that the matter had been raised with Libya through the Interests Section on a number of occasions, urging payment. The Libyans had never suggested they could not pay and had said that they accepted responsibility; but the money had not been forthcoming. Spokesman added that Libya owed £189,661 to Westminster City Council and £32,837 to the Treasury Valuer. Iraq, according to Spokesman, owed £139,885 to Westminster City Council and £201,850 to the Treasury Valuer. Iraq, he said, had accepted responsibility and intended to pay.

(Text provided by the Foreign and Commonwealth Office)

In reply to the question what guidelines exist governing the involvement in the management or direction of UK companies of foreign diplomats based in the UK, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Article 42 of the Vienna convention on diplomatic relations states that a diplomat shall not in the receiving state practise for personal profit any

professional or commercial activity. We expect diplomats here to comply with this article.

(HC Debs., vol. 93, Written Answers, col. 601: 14 March 1986)

In a speech to the Sixth Committee of the General Assembly of the UN on 23 October 1986, the UK representative, Mr D. M. Edwards, on behalf of the twelve Member States of the European Community, stated:

Last year the distinguished representative of Belgium, also speaking on behalf of the Member States of the European Community, spoke in vigorous condemnation of the crimes committed against diplomatic and consular missions and representatives. He pointed out that such crimes endangered international relations by attacking the very people whose task it is to work for harmonious and peaceful relations between States. The dangerous implications of the actions that are the subject of this agenda item are therefore clear to see. The Twelve wish to repeat today their condemnation of all violence against diplomatic and consular missions and representatives.

The Twelve would also confirm their belief, expressed at the 40th Session, that current international conventions provide adequate means to secure the protection and safety of diplomatic and consular missions and representatives. Two important matters require attention. First, all States parties to the relevant conventions must comply with their obligations and make full use of all the means at their disposal to ensure the protection and safety of diplomatic and consular missions and representatives. Secondly, States not party to the international conventions on Diplomatic and Consular Relations should seriously consider becoming party without reservations that might be incompatible with the object and purposes of those conventions. In the meantime, such States must observe meticulously their obligations in this regard under customary international law.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/41/SR.23, pp. 9-10)

The following statement was made at a press conference held by the Foreign and Commonwealth Office on 19 November 1986:

... Spokesman said HMG had full diplomatic relations with Iran. For security reasons, relations had, since 1980, been maintained in Tehran through a British Interests Section under Swedish protection. Questioned further, Spokesman said he was not aware of any plans to change this system of representation. Iran maintained a full embassy in London, headed by a *Chargé d'Affaires*.

At a similar press conference held on 20 November 1986, it was stated:

... there were no plans to change the current arrangements in Tehran under which the British Interests Section operates under the protection of Sweden. Spokesman further explained that the UK maintained an embassy in Tehran until well after the institution of the Islamic Republic in Iran in 1979. But in September 1980, during the American hostage crisis, the Iranians were unable to guarantee the safety of the British Embassy. Consequently HMG voluntarily withdrew its Embassy and placed itself under Swedish protection.

(Texts provided by the Foreign and Commonwealth Office)

Part Five: V. *Organs of the State—consular agents and consulates*

(See also Part Five: IV., above)

In reply to a question on the subject of relations with Guatemala, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

It is not normal international practice to impose preconditions on the establishment of consular or diplomatic relations.

(HC Debs., vol. 90, Written Answers, col. 145: 21 January 1986)

The following statement was issued by the Foreign and Commonwealth Office at a press conference held on 19 August 1986:

The Governments of Guatemala and the United Kingdom, considering it to be in the interests of their respective peoples to establish direct official links with the aim of furthering peace and cooperation, have decided to establish consular relations at the level of Consulates with immediate effect. The two Governments hope to re-establish full diplomatic relations before the end of the year.

A similar statement is being issued simultaneously by the Guatemalan authorities.

The Guatemalan announcement will contain the following third sentence: 'Guatemala expects that Great Britain will cooperate with its Government in finding satisfactory solutions in the Belize controversy.'

In response to questions, Spokesman recalled that Guatemala unilaterally broke off diplomatic relations with the UK in 1963 and consular relations in 1981. On both occasions their decision was related to their claim to Belizean territory.

Spokesman explained to another questioner that the third sentence in the Guatemalan announcement was a unilateral addition and a matter for them. Spokesman stressed that Belize was an independent country. The issue of Belize/Guatemala relations was entirely separate from relations between the UK and Guatemala.

(Text provided by the Foreign and Commonwealth Office)

Part Five: VIII. A. *Organs of the State—immunity of organs of the State—diplomatic and consular immunity*

The following press statement was issued by the Foreign and Commonwealth Office on 10 May 1986:

Mr Ewen Fergusson, Deputy Under-Secretary of State, asked the Syrian Ambassador to call today. This followed earlier calls by Dr Haydar on the Permanent Under-Secretary at the FCO, Sir Antony Acland, on 1 May, when Sir Antony raised with Dr Haydar allegations about Syrian involvement in certain terrorist activities in this country. On behalf of the police Sir Antony asked that the Ambassador should waive the diplomatic immunity of three members of his staff to enable the police to ask them questions about these allegations. On 5 May Dr Haydar called on Mr Ewen Fergusson to say that his Government was not willing to allow diplomatic immunity to be waived but would permit interviews with members of his staff on Embassy premises.

The Metropolitan Police were informed of the terms on which the Syrian Government were prepared to allow questioning to be carried out. They concluded that interviews under such conditions, in circumstances which could not result in evidence which might be used in court, could not assist their investigation.

Mr Fergusson told Dr Haydar today that the British Government regretted that the Syrian authorities were not willing to meet our request for a waiver of diplomatic immunity which would have allowed the allegations against the three members of the Syrian Embassy to be fully investigated. He said that the British Government required the withdrawal of the three members of his staff within seven days.

(Ibid.; see also HC Debs., vol. 97, cols. 447-8: 12 May 1986 and HL Debs., vol. 90, cols. 975-6: 12 May 1986)

At a press conference held on 4 July 1986, the Foreign and Commonwealth Office spokesman referred to reports that the Honorary British Consul in Perpignan, while on a visit to the UK, had contacted two women, victims of rape attacks in France, on behalf of the families of the alleged French attackers. The report of the press conference continued:

Spokesman explained that the Honorary Consul was not a member of the Diplomatic Service but a private businessman who received a small gratuity for the tasks he undertook on HMG's behalf but was not otherwise remunerated. Spokesman added that, under the terms of the Anglo-French Consular Convention, an Honorary Consul was only entitled to immunity in respect of acts performed in his official capacity. Immunity did not apply to any actions that might have been performed in this country.

(Text provided by the Foreign and Commonwealth Office)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

The White Paper on diplomatic privileges and immunities made clear that stricter standards would be applied on breaches of the criminal law by diplomats. We normally request the withdrawal of a diplomat who has committed a second drink driving offence, or the first if aggravated by violence, injury to a third party or previous traffic offences.

(HC Debs., vol. 101, Written Answers, col. 63: 7 July 1986)

In reply to a second question, the same Minister wrote:

The White Paper on diplomatic privileges and immunities, Cmnd. 9497, made clear that our objective is to achieve a better standard of behaviour and a reduction in the number of offences for which immunity can be claimed. In each case the strength of available evidence, normally from detailed police reports, and other relevant factors are taken into account. Article 31 of the Vienna convention on diplomatic relations, which is scheduled as United Kingdom law by virtue of the Diplomatic Privileges Act 1964, provides that a diplomat shall enjoy immunity from the criminal jurisdiction of the receiving state. A person entitled to diplomatic immunity cannot be forced, under article 29 of the

Vienna Convention, to undergo a breath test or other medical examination. A decision is therefore taken on whether or not to request a waiver of immunity in order that the case may be tried. Waivers can be granted only by the sending state. In drink-driving cases, a waiver even if granted would come too late to allow the necessary medical evidence for conviction to be obtained. We therefore do not request a waiver in drink-driving cases. Our policy is to request the withdrawal of diplomats after the first drink-driving offence if aggravated by violence, injury to a third party, or previous traffic offences.

The Foreign and Commonwealth Office draws the attention of the head of mission to the details of a first offence. He is asked to warn the offender that a repetition will lead to a removal, and to inform us that he has done so. The figures requested on drink-driving offences are as follows:

<i>Alleged drink-driving offences by persons enjoying diplomatic immunity</i>						
	1981	1982	1983	1984	1985	1986 to date
Total	17	19	30	32	24	10
Of which second offences	*	1	4	2	7	1

* Figures not available.

(Ibid., col. 64)

Article 3 of the Agreement concerning the Settlement of Mutual Financial and Property Claims arising before 1939, concluded by the Governments of the UK and the Soviet Union on 15 July 1986, reads as follows:

The Government of the United Kingdom shall authorise the direct release to the Government of the Union of Soviet Socialist Republics of those monies in the sum of £2.65 million sterling held in diplomatic and certain miscellaneous official bank accounts of individuals and entities representing the former Imperial Russian Government, or the former Russian Provisional Government.

Referring to this provision, the Minister of State, Foreign and Commonwealth Office, wrote:

These were essentially embassy and diplomatic accounts which enjoy a special status under international law.

(HL Debs., vol. 478, col. 895: 15 July 1986)

At a press conference held by the Foreign and Commonwealth Office on 18 September 1986, the following statement was made:

Asked about Italian proposals for the scanning of diplomatic bags, Spokesman said that HMG was in touch with the Italian authorities but it was not yet clear how the Italian Government planned to implement their declared intentions. As a matter of general policy, Spokesman continued, HMG did not allow British diplomatic bags to be submitted to X-ray scanning.

(Text provided by the Foreign and Commonwealth Office)

In the course of a debate on the subject of unpaid parking fines by members of diplomatic missions and the practice of wheel clamping, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

... because diplomats have immunity from criminal jurisdiction and clamping is a penal measure both in intent and in effect, it in fact contravenes the Vienna Convention.

(HL Debs., vol. 480, cols. 235-6: 8 October 1986)

In a speech to the Sixth Committee of the General Assembly of the UN on 23 October 1986, the UK representative, Mr D. M. Edwards, on behalf of the twelve Member States of the European Community, stated:

The Twelve also wish to draw attention to the potential danger of abuses of diplomatic and consular privileges and immunities. Such abuses damage the credibility of those who are entitled to them and who are required, as a matter of law, to respect the laws and regulations of the receiving State. The Governments of the Twelve remain determined to prevent abuses of diplomatic and consular immunity and have continued their cooperation, reported in the Sixth Committee last year, to combat it.

(Text provided by the Foreign and Commonwealth Office; see also A/C. 6/41/SR. 23, p. 9)

In the course of a debate in the House of Commons on the subject of Syrian official complicity in terrorist activity in London, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

But the problem remains that, if the legitimate value of immunity from inspection for diplomatic bags is not to be challenged and overthrown worldwide, one must stop short of committing search as a general rule. I believe that the Foreign Affairs Committee endorsed our view that in certain exceptional circumstances, where danger to human life is anticipated, the right to search may arise.

(HC Debs., vol. 102, col. 1510: 24 October 1986)

In a letter dated 2 November 1984, the Foreign and Commonwealth Office advised the Westminster City Council, which had enquired about the legal status of the premises once occupied by the Iranian mission, as follows:

As requested, I confirm that in our view this building no longer constitutes the premises of the Iranian mission within the meaning of Article 1(i) of the Vienna Convention on Diplomatic Relations and therefore no longer enjoys inviolability (Article 22 of the Convention).

(Text provided by the Foreign and Commonwealth Office)

In a communication dated 1 December 1986 to the Secretary-General of the UN, pursuant to paragraph 11 of General Assembly Resolution 40/73, the UK referred to comments by the Soviet Union about incidents in London. The communication continued:

. . . in paragraph 10 of their comments in document A/41/547, the Soviet Union makes some remarks about the illegal parking of diplomatic vehicles. Parking regulations relating to diplomats in London in no way contravene the provisions of the Vienna Convention on Diplomatic Relations of 1961. The United Kingdom Government would wish to draw attention to article 41 of this Convention which requires all persons enjoying privileges and immunities to respect the laws and regulations of the receiving State.

(A/41/547/Add. 4, p. 3)

In reply to a question on the subject of strip searches by Customs and Excise staff on persons arriving in the UK, the Minister of State, Home Office, wrote in part:

Exemption from search is confined to very limited categories of persons falling to be considered under the Diplomatic Privileges Act 1964, the State Immunity Act 1978 or the International Organisations Act 1968. Typically these categories could involve only such as a Sovereign or Head of State or accredited diplomats and their families.

(HC Debs., vol. 107, Written Answers, col. 497: 16 December 1986)

Part Five: VIII. B. *Organs of the State—immunity of organs of the State—immunity other than diplomatic and consular*

(See also Part Three: III. F., above)

On signing the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region at Cartagena, Colombia, on 24 March 1983, the Delegations of the UK and the US made the following 'Interpretative Statement':

This Convention in no way alters international law relating to the sovereign immunity of any warship, naval auxiliary or other ship or aircraft owned or operated by a State and used for the time being only on government non-commercial service. However, each Contracting Party shall ensure by the adoption of appropriate measures not impairing the operations or operational capabilities of such ships or aircraft owned or operated by it that such ships and aircraft act in a manner consistent so far as is reasonable and practicable with the present Convention.

(*International Legal Materials*, 22 (1983), at p. 226)

In the course of a speech on 11 November 1986 to the Sixth Committee of the General Assembly debating the report of the International Law Commission, the UK representative, Sir John Freeland, turned to the part of the report which dealt with jurisdictional immunities of States and their property. He said:

As regards draft article 21, on State immunity from measures of constraint, I will not go over again matters which have been dealt with in statements by my delegation in earlier years. I would, however, like to make one point now. The draft article sets out the conditions which have to be met before property belonging to a State may be subject to measures of execution. One of these

conditions is that the property must have 'a connection with the object of the claim'. My delegation does not believe that this limitation is necessary: if there is a motor traffic accident which is the fault of the driver of a State-owned commercial vehicle, is it sensible for the injured plaintiff to be restricted, in seeking to execute a judgment in his favour, to taking measures against only the vehicle concerned in the accident? Furthermore Mr Chairman, the phrase I have quoted seems to my delegation to be vague; what degree of connection is required? Could a plaintiff take measures of execution against State-owned commercial premises simply because the contract, out of which the dispute arose, was signed there?

(Text provided by the Foreign and Commonwealth Office; see also A/C. 6/41/SR. 39, p. 3)

Part Five: IX. *Organs of the State—protecting powers*

(See also Part Thirteen: I. E. (materials relating to Syria), below)

The following note, dated 31 October 1986, was delivered to the Lebanese Embassy in London:

The Foreign and Commonwealth Office present their compliments to the Lebanese Embassy and have the honour with reference to the Embassy's note . . . of 30 October to confirm that the British Government accept the appointment of Lebanon as protecting power in the United Kingdom of the Syrian Arab Republic on the understanding that the Syrian Government has accepted the appointment of Australia as protecting power of the United Kingdom in Syria.

Subject to confirmation from the Embassy of Lebanon that this reciprocal arrangement is acceptable to the Syrian Government, the Lebanese Embassy in London and the Australian Embassy in Damascus will assume the responsibilities of representing the interests of Syria and the United Kingdom respectively with effect from midnight on 31 October/1 November.

The Foreign and Commonwealth Office wish to establish an interests section within the Australian Embassy in Damascus and to allow the Syrian Government to establish a reciprocally-staffed interests section within the Lebanese Embassy in London subject to a maximum of 4 diplomats and 2 Administrative and Technical staff in each case. The Foreign and Commonwealth Office agree that M Issa, M Sarra and M Dayoub should initially remain in London to staff the Syrian Interests Section. Mr Asquith, Mr Shead and Mr Fairholme will remain at Damascus to staff the British Interests Section. The Foreign and Commonwealth Office propose that both interests sections should be accommodated in the present Syrian and British chancery premises in London and Damascus and that both should retain radio communications and cypher facilities.

(Text provided by the Foreign and Commonwealth Office)

Part Six: I. A. *Treaties—conclusion and entry into force—conclusion, signature*

(See also Part One: II. D. (item of 27 January 1986), above and Part Six: I. C. (item of 5 February 1986), below)

In reply to the question 'if there is any precedent for a verbal agreement accepted informally by representatives of EC member states without an agreed text being described as a treaty', the Minister of State, Foreign and Commonwealth Office, wrote:

On the assumption that the hon. Member is referring to the 1984 intergovernmental agreement, the draft text for adoption was before the representatives of the member states meeting within the Council in a written form and the text as adopted appears in written form in the Council minutes. Agreement to that text was expressed orally. Article 11 of the Vienna convention on the law of treaties provides that the consent of a state to be bound by a treaty 'may be expressed by signature, exchange of instruments constituting a Treaty, ratification, acceptance, approval or accession or by any other means if so agreed'.

My right hon. Friend the Prime Minister has previously referred the hon. Member to precedents, on 12 June 1986 at column 287.

(HC Debs., vol. 101, Written Answers, col. 124: 8 July 1986)

Part Six: I. B. *Treaties—conclusion and entry into force—reservations and declarations in multilateral treaties*

In the course of a debate on the subject of the 1977 Protocols to the 1949 Geneva Conventions on humanitarian law, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

... on signing the protocols in 1977 the United Kingdom made a statement of understanding to the effect that: 'the new rules . . . are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.'

Later in the debate, the Minister of State said:

... we made a statement of understanding. As I understand it, that is not the same as a reservation.

(HL Debs., vol. 474, cols. 512-13: 2 May 1986)

In reply to a later question on the same subject, the Minister of State remarked:

... as I made clear to the noble Lord on 2nd May, I am aware of the United Kingdom's statement of understanding on signature of the 1977 protocols additional to the Geneva Conventions. That did not constitute a reservation.

...

I gave a correct answer to the Question that he asked on 2nd May. The function of a reservation is to modify for the reserving state the provisions of a treaty or protocol. In this case the United Kingdom would not need to enter any reservation on nuclear weapons, since the protocol does not contain any provisions relating to them.

...

... as I indicated in an earlier answer, a reservation modifies for the reserving state the provisions of the treaty or protocol. In this case, a reservation was not necessary because the protocols do not contain provisions relating to nuclear

weapons. We made a statement to make clear our understanding about the additional protocols . . .

(Ibid., vol. 475, cols. 541–3 *passim*: 2 June 1986)

Part Six: I. C. *Treaties—conclusion and entry into force—entry into force, ratification and accession*

In the course of a debate in the House of Lords on the second reading of the Outer Space Bill, the Parliamentary Under-Secretary of State, Department of Trade and Industry, Lord Lucas of Chilworth, stated:

. . . signature is not the same as ratification. Ratification is a separate act and according to the constitutional convention in this country if legislation is required ratification comes after the legislation, and here is the legislation.

(Ibid., vol. 470, col. 1107: 5 February 1986)

In reply to the question by what means does the Secretary of State for Foreign and Commonwealth Affairs propose to obtain the ratification by the UK Parliament of those titles of the 'Single European Act' (Cmnd. 9758) not named in clause 1 of the European Communities (Amendment) Bill, the Minister of State, Foreign and Commonwealth Office, wrote:

The authority to ratify a treaty is vested in my right hon. and learned Friend as the Secretary of State for Foreign and Commonwealth Affairs. In accordance with the practice known as the 'Ponsonby rule', the Single European Act has been laid before Parliament in the form of a Command Paper (Cmnd. 9758). The House will have a full opportunity to debate the Single European Act as a whole when considering the European Communities (Amendment) Bill.

(HC Debs., vol. 95, Written Answers, col. 244: 14 April 1986)

Part Six: II. A. *Treaties—observance, application and interpretation—observance*

(See also Part Fourteen: I. A. 3., below)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

Implementation by the Soviet Union and eastern European countries of their commitments under the Helsinki final act over the six-month period to 31 December 1985 has continued to be generally unsatisfactory. Levels of compliance have reflected the Warsaw Pact countries' selective interpretation of their commitments. There have again been widespread breaches of the provisions relating to human rights and fundamental freedoms though with variations in the pattern of implementation as between individual states.

(Ibid., vol. 93, Written Answers, col. 89: 4 March 1986; see also HL Debs., vol. 472, col. 165: 4 March 1986)

On 14 March 1986 the twelve Member States of the European Community delivered to the US Secretary of State a memorandum on the financial situation of the UN. This read in part as follows:

The twelve member States of the European Community are deeply concerned about the financial situation of the United Nations. They regret the fact that a number of member States of the U.N. are in arrears with their assessed contributions to the U.N.

The Twelve wish to express their concern that recently enacted U.S. legislation, in particular the Gramm–Rudman–Hollings act and the Kassebaum amendment, is significantly affecting the Administration's ability to comply with its international treaty obligations. The implementation of such legislation will result in the United States not fully meeting its financial obligation to the United Nations as contained in Article 17, paragraph 2, of the Charter, in the form of substantial U.S. withholdings on the 1985 and 1986 assessed contributions to the U.N. and to other organizations.

At the basis of international law is the adherence by States to obligations they have freely entered into. Selective adherence to the principle 'pacta sunt servanda' erodes the very foundation of the international order. In this respect financial obligations are not different from any other international obligations.

Partial observance of financial obligations obviously affects the financial stability and orderly functioning of the organization concerned. These ill effects are further aggravated for the U.N. by the element of retroactivity embodied in the Gramm–Rudman legislation. Given the importance of the U.S. contribution, a financial shortfall on such a scale threatens the integrity and cohesion of the U.N.

On the other hand, full observance of its obligations by the United States would safeguard its standing in the eyes of the international community and avoid a situation which could lead to serious political consequences.

Accordingly, the Twelve urge the U.S. Government to take the necessary steps to enable the United States to meet its international obligations to the United Nations and other international organizations.

(International Legal Materials, 25 (1986), pp. 482–3)

Part Six: II. B. *Treaties—observance, application and interpretation—application*

The following three items are representative of several along similar lines which occurred during 1986.

In a letter dated 31 December 1985 addressed to the Director-General of the International Maritime Satellite Organization (INMARSAT), the Soviet Embassy in London protested at the statement made by the Federal Republic of Germany in ratifying the Protocol on the Privileges and Immunities of INMARSAT that it extends the application of the Protocol to West Berlin. In response, the following *note verbale* was transmitted on 12 August 1986 to the Director-General by the US Ambassador in London:

On behalf of the Governments of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America, I have the honor to refer to the Communication of 31 December 1985 from the Embassy of the Union of Soviet Socialist Republics annexed to your Note Verbale of 14 January

1986, concerning the Protocol on the Privileges and Immunities of the International Maritime Satellite Organization (INMARSAT) and to state the following:

In a Communication to the Government of the Union of Soviet Socialist Republics, which is an integral part (Annex IVA) of the Quadripartite Agreement of 3 September 1971, the Governments of France, the United Kingdom and the United States, without prejudice to the maintenance of their rights and responsibilities relating to the representation abroad of the interests of the Western Sectors of Berlin, confirmed that, provided that matters of security and status are not affected and provided that the extension is specified in each case, international agreements and arrangements entered into by the Federal Republic of Germany may be extended to the Western Sectors of Berlin in accordance with established procedures.

The established procedures referred to above, which were endorsed in the Quadripartite Agreement, are designed *inter alia* to afford the authorities of the three powers the opportunity to ensure that international agreements and arrangements entered into by the Federal Republic of Germany which are to be extended to the Western Sectors of Berlin are extended in such a way that matters of security and status are not affected.

When authorizing the extension of the Protocol on the Privileges and Immunities of INMARSAT to the Western Sectors of Berlin, the authorities of the three powers took such steps as were necessary to ensure that matters of security and status were not affected. Accordingly, the Berlin Declaration made by the Federal Republic of Germany in accordance with established procedures is valid and the Protocol will apply to the Western Sectors of Berlin, subject to Allied rights and responsibilities including those in the area of privileges and immunities.

(Text provided by the Foreign and Commonwealth Office)

By a letter dated 2 December 1985 addressed to the Secretary-General of the UN, the Government of the USSR referred to the application to West Berlin of the Convention on Long-Range Transboundary Air Pollution of 1979. In response, the Permanent Mission of France in a note dated 25 July 1986 stated:

The Governments of France, the United Kingdom and the United States cannot accept the assertions by the Permanent delegation of the Union of Soviet Socialist Republics that greater Berlin no longer exists and that Berlin is the capital of the German Democratic Republic.

The position of the three governments on the continuing quadripartite status of greater Berlin is well known and was set out for example in a letter to the Secretary General of the United Nations of 14 April 1975 (A/10078 and Corr.1). (Ibid.)

The Allied Kommandatura in Berlin issued the following statement on 8 October 1986 on the subject of the European Agreement on Main International Railway Lines:

1. The Allied Kommandatura raises no objection to the extension to Berlin of the above-mentioned Agreement subject to the following provisions:

The application of the Agreement in the Western Sectors of Berlin remains subject to the rights and powers of the Allied Authorities over railway operations which are not affected;

The German authorities in applying the Agreement shall take full account of the special situation of railway operations in Berlin and the law in force in the Western Sectors of Berlin.

2. This Order will be transmitted to the Governing Mayor of Berlin for such action as may be necessary in relation to it, including publication in accordance with BK/O(64)4.

(Ibid.)

In reply to Argentina, which had expressed a reservation to the UK's extension to the Falkland Islands of the application of the UN Convention on the Status of Refugees, 1951, the UN stated on 1 October 1986 in part:

... with reference to the reservation of the Government of the Argentine Republic, the Government of the United Kingdom of Great Britain and Northern Ireland state that the Falkland Islands is a British dependent territory. The British Government have no doubts about United Kingdom sovereignty over it. They therefore have no doubts as to their right to extend the application of the Convention in question to the Falkland Islands in accordance with the notification of 25 October 1956 (repeat 1956) to the Secretary-General of the United Nations from the Permanent Representative of the United Kingdom. For this reason alone, the Government of the United Kingdom are unable to regard the Argentine reservation as having any legal effect.

(A/AC. 96/685, p. 4)

Part Six: II. C. *Treaties—observance, application and interpretation—interpretation*

In reply to the question whether an experiment in which a laser beam weapon is used against a ballistic missile in flight would constitute a 'test' of the kind precluded under the ABM Treaty of 1972, the Minister of State, Foreign and Commonwealth Office, wrote in part:

It is not for us to determine whether any specific activity by parties to a treaty to which we are not a party is or is not in accordance with it.

(HL Debs., vol. 472, col. 786: 13 March 1986)

In the course of a debate on the subject of the European Communities (Amendment) Bill, the Minister of State, Foreign and Commonwealth Office, Mrs Lynda Chalker, said of the Single European Act:

Several hon. Members asked exactly what the status of the preamble is in relation to the substantive provisions of the Single European Act. Article 31(1) of the Vienna convention on the Law of Treaties provides that treaties 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

Article 31(2) of the convention makes it clear that the preamble forms part of the context in which the treaty must be interpreted.

(HC Debs., vol. 101, col. 558: 10 July 1986)

Part Six: II. D. *Treaties—observance, application and interpretation—treaties and third States*

(See also Part Six: II. C. (item of 13 March 1986), above)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The United Kingdom is not a party to either SALT 1 or SALT 2, which are bilateral agreements between the United States and Soviet Union, although SALT 2 was never ratified. We therefore have no formal standing to pronounce on matters concerning their implementation.

(Ibid., vol. 100, Written Answers, col. 469: 1 July 1986)

In the course of a speech on 27 October 1986 in the Third Committee of the General Assembly of the UN on the subject of the status of the International Convention on the Suppression and Punishment of the Crime of Apartheid, the UK representative, Ms E. Young, on behalf of the twelve Member States of the European Community, said:

... this Convention, like other international agreements, is applicable only to States which have ratified it and to the citizens of those States. To act otherwise would be contrary to the generally accepted principle that treaties have no legal effects on States which are not party to them.

(Text provided by the Foreign and Commonwealth Office; see also A/C. 3/41/SR. 25, p. 7)

Part Six: V. *Treaties—depositaries, notification, corrections and registration*

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The arrangements governing use by United States forces of bases in the United Kingdom are not of a nature to require registration at the United Nations under article 102 of the United Nations charter.

(HC Debs., vol. 96, Written Answers, col. 223: 24 April 1986)

In reply to a question on the subject of the decision adopted by Ministers, meeting in the framework of European political co-operation, on the occasion of the Single European Act on 28 February 1986, the Minister of State, Foreign and Commonwealth Office, wrote:

The text of this decision was deposited in the Library of the House on 25 April. It was also annexed to the FCO memorandum for the Foreign Affairs Committee on the Single European Act (FCO/FAC/10/86) of 23 April and is published on pages 44 to 47 of the minutes of evidence taken on 7 May 1986 by the Committee. The decision adopted by the Ministers of the member states of

the EC meeting in political co-operation sets out procedures for the practical application of certain aspects of title III of the Single European Act. It does not form part of the Single European Act and has not been registered under article 102 of the United Nations charter as an international agreement.

(Ibid., vol. 99, Written Answers, col. 433: 16 June 1986)

Part Seven: I. *Personal jurisdiction—general concept*

(See Part Eight: II. D. (item of 2 June 1986), below)

Part Seven: II. B. *Personal jurisdiction—exercise—military jurisdiction*

In reply to a question about the military regulations applicable to service personnel stationed at a foreign base or joint NATO base where personnel from the host State or another NATO State are also stationed, the Parliamentary Under-Secretary of State for Defence Procurement wrote:

United Kingdom personnel are subject to United Kingdom service law wherever they may be serving at home or abroad. They are also required to observe whatever local military regulations govern activities at foreign and NATO bases at which they are stationed.

(Ibid., vol. 91, Written Answers, col. 389: 10 February 1986)

Part Seven: II. C. *Personal jurisdiction—exercise—miscellaneous*

Section 3 (1) of the Protection of Military Remains Act 1986 (1986 c. 35) reads as follows:

Extraterritorial jurisdiction

3.—(1) Where a contravention of subsection (2) of section 2 above occurs in international waters or an excavation or operation prohibited by subsection (3) of that section is carried out in international waters, a person shall be guilty of an offence under that section in respect of that contravention, excavation or operation only—

- (a) if the acts or omissions which constitute the offence are committed in the United Kingdom, in United Kingdom waters or on board a British-controlled ship; or
- (b) in a case where those acts or omissions are committed in international waters but not on board a British-controlled ship, if that person is—
 - (i) a British citizen, a British Dependent Territories citizen or a British Overseas citizen; or
 - (ii) a person who under the British Nationality Act 1981 [1981 c. 61] is a British subject; or
 - (iii) a British protected person (within the meaning of that Act); or
 - (iv) a company within the meaning of the Companies Act 1985 [1985 c. 6] or the Companies Act (Northern Ireland) 1960 [1960 c. 22 (N.I.)].

Part Eight: I. A. *State territory and territorial jurisdiction—parts of territory, delimitation—frontiers*

Article 3 (1) of the Treaty concerning the Construction and Operation

by Private Concessionaires of a Channel Fixed Link, signed by the UK and France on 12 February 1986, reads in part as follows:

As regards any matter relating to the Fixed Link, the frontier between the United Kingdom and France shall be the vertical projection of the line defined in the Agreement signed at London on 24 June 1982 relating to the delimitation of the Continental Shelf in the area east of 30 minutes West of the Greenwich meridian, and the respective States shall exercise jurisdiction accordingly . . .

(Cmnd. 9745, p. 3. For the 1982 Agreement, see TS No. 20 (1983) (Cmnd. 8859))

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Successive British Governments have given de facto but not de jure recognition to the border between Poland and the German Democratic Republic. There has been no change in that position.

(HC Debs., vol. 100, Written Answers, col. 335: 27 June 1986)

Part Eight: II. A. *State territory and territorial jurisdiction—territorial jurisdiction—territorial sovereignty*

(See also Part Six: I. B. (item of 1 October 1986), above and Part Eight: IV., below)

On 30 January 1986, in the UN Security Council, the UK Permanent Representative to the UN in New York, Sir John Thomson, remarked:

The Council has, furthermore, made it clear that the part of Jerusalem occupied by Israel since 1967, like the remainder of the West Bank and the Gaza Strip, constitutes occupied territory to which the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War are applicable. The Council has also in a series of resolutions, including resolution 478 (1980), shown that it rejects Israel's claim, repeated in this debate last week by the Permanent Representative of Israel, to sovereignty over the entire city. All these Council resolutions which are reaffirmed in the draft resolution before us are upheld by my Government.

My delegation welcomes the positive references by many speakers in the debate so far to the need for strict respect for the proper status of Jerusalem and to the importance of this in the attainment of a comprehensive, just and lasting peace, for which my Government continues to work actively with all the parties concerned. My Government's long-standing position remains that it is unable to recognize the sovereignty of any State over Jerusalem pending a final determination of the status of the area.

(S/PV. 2650, p. 21)

In reply to the question what steps have Her Majesty's Government taken recently to facilitate implementation of the 1984 UN resolution on Kashmir, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

None. The question of Kashmir is one to be decided bilaterally between India and Pakistan.

(HC Debs., vol. 94, Written Answers, col. 538: 27 March 1986)

In reply to the question

Whether [Her Majesty's Government] consider the four islands of the Kurile Chain (Etorofu, Kunashiri, Shikotan and Habomai) to be territories to which Japan has a legitimate claim, or whether they consider them to form part of the Soviet Union,

the Minister of State, Foreign and Commonwealth Office, wrote:

We are aware of the Japanese claim to the Islands of Etorofu, Kunashiri, Shikotan and Habomai. This is a complex legal and political issue which is a matter for resolution between the governments of Japan and the Soviet Union.

(HL Debs., vol. 477, col. 1021; 3 July 1986)

In reply to a question, the Minister for the Arts, Mr Richard Luce, stated:

It is firmly established that the Elgin marbles were legally acquired under the sovereignty of the Ottoman empire as it was at that time. In 1816, the British Parliament passed an Act of Parliament that gave the authority to the British museum to retain the Elgin marbles.

(HC Debs., vol. 101, col. 15: 7 July 1986)

In reply to the question what in the opinion of Her Majesty's Government is the status in international law of the island which emerged in the Pacific after an under-sea volcano erupted in January 1986, as reported in *The Times*, 22 January 1986, the Minister of State, Foreign and Commonwealth Office, wrote:

We understand that the island emerged within the territorial sea of the Japanese island Iwo Jima. We take it therefore to be Japanese territory.

(HL Debs., vol. 478, col. 1005: 17 July 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The United Kingdom recognises Canadian sovereignty over all the land within the Canadian Arctic Archipelago.

(Ibid., vol. 480, col. 468: 9 October 1986)

In the course of an *amicus curiae* Brief filed before the Supreme Court of the US in the October Term 1986, the Government of the UK observed:

While the United Kingdom has expressed the most serious concern about the proper scope of U.S. jurisdiction to impose re-export controls and anti-boycott restrictions once goods and information have left U.S. territory, the sovereignty of the United States to impose those controls *within* the United States (including transmission of information across its borders) should not be challenged. That

jurisdiction 'is necessarily exclusive and absolute.' *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C. J.).

(Supreme Court of the USA: *Société Nationale Industrielle Aérospatiale and Société de Construction d'Avions de Tourisme v. United States District Court for the District of Iowa*, October Term 1986. Brief of the Government of the UK as *amicus curiae* in support of petitioners, p. 16, footnote 22)

On 21 November 1986, the UK Permanent Representative to the UN in New York, Sir John Thomson, addressed a communication to the UN Secretary-General, in which he stated:

... my Government rejects the claim of the Argentine Republic, as contained in its note of 3 October annexed to its letter to the Secretary-General of 3 November (A/41/788-S/18441), to sovereignty over the Falkland Islands, the South Georgia and the South Sandwich Islands. The United Kingdom has and exercises sovereignty over these territories in accordance with international law; it is also in accordance with the wishes of the inhabitants.

(A/41/868, p. 3; S/18473, p. 3)

Part Eight: II. C. State territory and territorial jurisdiction—territorial jurisdiction—concurrent territorial jurisdiction

The following two items are representative of several along similar lines occurring during 1986.

In a letter dated 21 January 1986 addressed to the Chairman of the European Commission for Europe's Group of Experts on Environmental Impact Assessment, the Soviet delegation protested against the inclusion in the delegation of the Federal Republic of Germany of an official of the Federal Environmental Agency, located in West Berlin. In response, the following letter dated 23 January 1986 was sent to the Chairman by the delegation of the US:

On behalf of the delegations of France, the United States of America, and the United Kingdom of Great Britain and Northern Ireland, I should like to address you on the subject raised by the Head of the USSR delegation in his letter to you of 21 January 1986.

The establishment of the Federal Environmental Agency in the western sectors of Berlin was approved by the French, American and British authorities acting on the basis of their supreme authority. These authorities are satisfied that the Federal Environmental Agency does not perform in the western sectors of Berlin acts in exercise of direct State authority over the western sectors of Berlin. Neither the location nor the activities of that Agency, in the western sectors of Berlin, therefore, contravenes any of the provisions of the Quadripartite Agreement.

We cannot agree that the involvement of institutions such as the Federal Environmental Agency in any way impedes the work of the ECE.

Furthermore, there is nothing in the Quadripartite Agreement which supports the contention that residents in the western sectors of Berlin may not be included in delegations of the Federal Republic of Germany to international conferences,

in fact Annex IV to the Quadripartite Agreement stipulates that, provided matters of security and status are not affected, the Federal Republic of Germany may represent the interests of the western sectors of Berlin in international conferences and that western sectors of Berlin residents may participate jointly with participants from the Federal Republic of Germany in international exchanges. Furthermore, as a matter of principle, it is for the Federal Republic of Germany alone to decide on the composition of its delegation.

Regarding other communications on this subject, I would like to state that States which are not parties to the Quadripartite Agreement are not competent to comment authoritatively on its provisions.

(Text provided by the Foreign and Commonwealth Office)

On 14 February 1986 the Soviet representative protested to the Chairman of the Ninth Special Session of the UN Commission on Narcotic Drugs about the mention in a session document of the Federal Health Agency, located in West Berlin. In response, the representative of the US, in a letter to the Chairman dated 3 June 1986, stated:

With reference to the letter of 14 February 1986 from the representative of the Union of Soviet Socialist Republics to you concerning the reference to the Federal Health Office in document. E/CN. 7/1986/INF.2/REV.1, I wish to state the following on behalf of the delegations of France, the United States of America and the United Kingdom.

The establishment of the Federal Health Office in the western sectors of Berlin was approved by the French, American and British authorities acting on the basis of their supreme authority. The Federal Health Office exercises its functions under a law which was adopted in Berlin in accordance with established procedures. The activities of the Federal Health Office in the western sectors of Berlin do not constitute constitutional or official acts of a state body of the Federal Republic of Germany which contradict the provisions of paragraph 1 of annex II of the Quadripartite Agreement of 3 September 1971. Neither the location nor the activities of the office in the western sectors of Berlin, therefore, contravene any of the provisions of the Quadripartite Agreement.

In these circumstances there can be no reason to exclude mention of the Federal Health Office from the documents of the Commission.

Furthermore, the letter from the representative of the Union of Soviet Socialist Republics contains an incomplete and consequently misleading reference to the Quadripartite Agreement. The relevant passage of that agreement to which the Soviet letter referred provides that the ties between the western sectors of Berlin and the Federal Republic of Germany will be maintained and developed, taking into account that these sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it.

Regarding other communications on this subject, I would like to state that states which are not parties to the Quadripartite Agreement are not competent to comment authoritatively on its provisions.

(E/CN. 7/1986/12/Add. 1, p. 2)

The following press statement was issued on 25 February 1986 with reference to the Law concluded on 28 April 1950 by representatives of

the UK, US and France, entitled, 'Control of persons entering Greater Berlin and expulsion of undesirable persons':

The Allied Kommandatura Board for the expulsion of undesirable persons ordered today that the following North Korean diplomats accredited to the German Democratic Republic be expelled in accordance with AK Law No. 8: Hong Sang-Pom, Kim Sung-Yun, Kwon Yong-Nok, and Yi Yong-Nam. These four officials have been working out of an office in the Western Sectors of the city, engaging in illicit arms transactions. The Allies will continue to take any action necessary to enforce applicable law and to prevent any abuse of the status of the city.

(Text provided by the Foreign and Commonwealth Office. A notice in similar terms was issued on 16 December 1986 in respect of other North Korean diplomats accredited to the German Democratic Republic)

In the course of replying to an oral question on the subject of the Visiting Forces Act 1952, the Parliamentary Under-Secretary of State, Home Office, Mr David Mellor, stated:

The arrangements cover who should have primary jurisdiction to deal with offences. If an offence is committed on a base and the only people involved are other service men, those forces deal with the offence in accordance with the rules of good order and discipline. If we object to the way in which they deal with the matter, we have a right under those arrangements to apply to have that jurisdiction waived.

(HC Debs., vol. 94, col. 403: 20 March 1986)

In reply to a question, the Minister of State for the Armed Forces wrote:

Service personnel of foreign nations on the public streets in Britain are subject to the offence-making provisions of British law in the same way as British service men are. However, the system of law under which they are dealt with for their misconduct will depend upon the terms of the Visiting Forces Act 1952 and how it applies to the facts of the case. The carriage of arms by members of visiting forces in Britain is governed by the provisions of the Visiting Forces and International Headquarters (Application of Law) Order 1965 (SI 1965/1536).

(Ibid., vol. 96, Written Answers, col. 333: 28 April 1986)

In reply to a question, the Minister of State for the Armed Forces wrote:

It is not a contravention of United Kingdom law for United States service men to carry arms in the United Kingdom, if they do so on duty authorised by their superiors. This arises by virtue of an extension of the provision in the firearms legislation exempting United Kingdom service men from its provisions, which has been applied to visiting forces by means of an order made in 1965 under section 8 of the Visiting Forces Act 1952. The authorisation for the United States service men will be a matter for their service superiors. Article VII paragraph 10 of the NATO status of forces agreement imposes certain restrictions on those areas where they can carry arms. I understand from the United

States authorities that no armed United States service men were deployed from their normal posts in the vicinity of the Oxford Street bombing on 24 April.

(Ibid., vol. 97, Written Answers, col. 103: 6 May 1986)

In reply to the question

Whether American amendments to any agreement with the United States Government have been accepted by Her Majesty's Government providing (a) for US Forces to quell protest or disorder by British subjects, (b) that no British subject shall be able to take action in the courts against any member of the US Forces, or (c) that the American authorities shall have the exclusive right to exercise criminal jurisdiction (and if so over what area or areas their jurisdiction will operate),

the Minister of State for Defence Support wrote:

I know of no such amendments to any agreement.

(HL Debs., vol. 474, col. 811: 7 May 1986)

In reply to a question, the Minister of State for Defence Procurement reproduced the following section of the communiqué published on the conclusion of talks between Churchill and Truman in January 1952:

Under arrangements made for the common defence, the United States has the use of certain bases in the United Kingdom. We reaffirm the understanding that the use of these bases in an emergency would be a matter for joint decision by Her Majesty's Government and the United States Government in the light of the circumstances prevailing at the time.

(HC Debs., vol. 98, Written Answers, col. 236: 21 May 1986)

Following the announcement by the German Democratic Republic of new regulations for crossing the sector boundary between East and West Berlin, the Foreign and Commonwealth Office announced at a news conference held on 27 May 1986:

The GDR measures violate the principle of free movement throughout Greater Berlin. The GDR has no right to take these measures. It remains the view of the NATO Allies that East Berlin is not part of the GDR and not its capital.

(Text provided by the Foreign and Commonwealth Office)

In reply to the question

... if Her Majesty's ambassador to the Federal Republic of Germany will seek from the Federal authorities their latest assessment of the Libyan involvement in the bomb explosion in Berlin in April,

the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

No. Berlin is not part of the Federal Republic of Germany and is not governed by it. The Allies, who have supreme authority in Berlin, remain in close touch with the German authorities in the city.

(HC Debs., vol. 98, Written Answers, col. 414: 3 June 1986)

In reply to a question, the Minister of State for Defence Procurement wrote:

The United States-United Kingdom lines of communication arrangement which has been in existence since 1973 permits the United States to establish, operate and maintain lines of communication and logistic support facilities in the United Kingdom for use under emergency conditions as part of their NATO obligations. The arrangement itself is classified and cannot therefore be published. It makes no powers available to United States armed forces in the United Kingdom in times of emergency.

(Ibid., col. 426: 3 June 1986)

The following statement was issued by the Foreign and Commonwealth Office on 8 June 1986:

On 8 June the authorities of the GDR held elections in the Eastern sector of Berlin in which Deputies from that sector were directly elected to the GDR Volkskammer.

The procedure under which the Eastern sector of Berlin directly elects representatives to the Volkskammer, and thereby treats this Sector as if it were part of the territory of the GDR, is in contradiction with the wartime and post-war agreements and decisions which defined the status of the Special Berlin Area, and accordingly also in contradiction with the Quadripartite Agreement of 3 September 1971, which applies to the whole of Berlin.

The Governments of France, the United Kingdom and the United States have publicly stated on many previous occasions that the status of the Special Berlin Area cannot be modified unilaterally and that they will continue to reject all attempts to put in question the rights and responsibilities which France, the United Kingdom and the United States retain relating to Germany as a whole and to all four sectors of Berlin. The three allied Governments reaffirm that no unilateral decision taken by GDR authorities can alter the legal situation of Greater Berlin. The three Governments will continue to exercise their full rights and responsibilities in Berlin and intend to present in Moscow a formal diplomatic protest to the Soviet Government concerning this action by the authorities of the GDR.

(Text provided by the Foreign and Commonwealth Office)

At the conclusion of the first stage of the Conference on Confidence- and Security-Building Measures and Disarmament in Europe, held in Stockholm, the Delegation of France made the following interpretative statement on 19 September 1986:

On behalf of the Governments of France, the United Kingdom and the United States of America, I wish to state that the points of agreement which have emerged during this Conference do not affect and can in no way affect the quadripartite rights and responsibilities relating to Berlin and to Germany as a whole.

(Ibid.)

On 7 October 1986, the Allied spokesman in Berlin issued the following press release:

East German military units participated today in a demonstration in Berlin. Their equipment included main battle tanks, armoured fighting vehicles, rocket carrying vehicles and launchers, and artillery pieces. The Allied commandants condemn the continuation of such illegal East German military displays, and the violation of the demilitarised status of the city.

(Ibid.)

Part Eight: II. D. State territory and territorial jurisdiction—territorial jurisdiction—extra-territoriality

(See also Part Seven: II. C., above)

On 3 July 1985, the Attorney-General, Sir Michael Havers, wrote to Mr P. Ashdown MP in the following terms:

I refer to your letters of 1 May and 25 June about US claims to extra-territorial jurisdiction and about the Export Administration Act.

US claims to extra-territorial jurisdiction have been a continuing source of friction for many years. Although these matters are primarily the concern of the Secretary of State for Trade and Industry and the Foreign Secretary, I have for some time been watching this closely and have been playing a part in trying to increase US awareness of the United Kingdom's view of their assertion of jurisdiction and in seeking to persuade the Americans to moderate their claims.

Two years ago I was invited to address the International Law and Practice Section of the American Bar Association in Atlanta and I took the opportunity to speak on this subject to US lawyers on their home ground. That speech was published in the *International Lawyer* [vol. 17 (1983)] and I enclose a copy of it. In particular you will see that on pages 792 to 794 I explained our objections to the Export Administration Act and suggested ways of curbing excesses in extra-territorial jurisdiction.

Thus you will see that I entirely share the views of the Secretary of State for Trade and Industry that claims by the United States government to control the export of goods from the UK and, as illustrated by the IBM letter, the more extravagant claim to control the sale of certain advanced computers within this country, are unwarranted encroachments on UK jurisdiction and are contrary to international law.

Similarly I share your view that the US has no right to impose fines or take other punitive action against firms in the United Kingdom which have 'violated' US re-export controls. Although US claims to extra-territorial jurisdiction are offensive it is only realistic to recognise that we cannot in practice compel the US to stop making such claims and seeking to enforce them. We have, of course, in the Protection of Trading Interests Act the means of making it unlawful for British firms and individuals to comply with such US action. This offers a means of safeguarding UK sovereignty, but it is necessary to consider in a particular case whether its use is likely on balance to benefit UK trading and commercial interests. The government's judgment has been that in these difficult circumstances UK firms and individuals should generally be allowed to make a commercial judgment about whether to comply with US licensing requirements and any subsequent enforcement action. The government are, however, always prepared to see what can be done to assist British companies experiencing difficulties.

You also suggest that the US has been operating its export rules to the advantage of its own companies. Such allegations are made from time to time but I understand that none has yet been substantiated. If satisfactory evidence were to be found, however, it is a matter which the government would take very seriously indeed and which I would expect to be taken up with the US authorities in the strongest terms.

As to the activities of US officials in the UK, there are no formal restrictions on their visiting British companies provided they keep within British law. It has been made quite clear to the US authorities, however, that their officials should not visit British firms to investigate possible breaches of US law without obtaining the agreement of the appropriate UK government department.

You mention activity by the EC Commission. It is certainly true that the Community as a whole shares our opposition to US extra-territorial claims and that a number of representations have been made to the US on the matter. I am not aware, however, of any investigation of the sort you mention, and it is not immediately obvious to me how that payment of fines by EC-based companies could be a breach of existing EC law.

You suggest that the issue should be before the International Court of Justice. Even if the Court had jurisdiction in the case—and I think it likely that the US would contest their jurisdiction—recourse to litigation is now always the best method of dealing with differences between States. The Government view is that the most productive approach to US extra-territoriality is to concentrate on managing the practical problems to which it gives rise. We have maintained this approach in talks between the two countries which led to the arrangement on export controls announced by the Minister for Trade in November last year.

The practical approach of course does not imply any weakening of our position on the principle. In appropriate cases the UK has submitted representations to the US government and *amicus curiae* briefs to US courts on important points of principle; and with other Western Allies, has continued to lobby the US on the need for legislative change.

For as long as the US claims extra-territorial jurisdiction, there will be an ever-present threat of disputes arising from US efforts to enforce these claims. There have been some limited signs, however, that continued representations by the UK and like-minded countries (no doubt coupled with growing awareness of the damage to US commercial interests of some of its policies) have led the US authorities to show rather more sensitivity about the application of US controls. The most recent example, I think, is the efforts made to avoid claims to extra-territorial application in US regulations prohibiting trade with Nicaragua. Our immediate aim must be to increase such sensitivity.

I think that to achieve this we have to work on the Americans and I believe that this is more likely to have an effect than a statement by me in the House of Commons. Later this month many lawyers from the American Bar Association will be coming to London for this year's Annual Conference. That will provide a further opportunity for discussion of these issues with the Americans.

(Reproduced in Kevin Cahill, *Trade Wars: the High-Technology Scandal of the 1980s* (W.H. Allen, London, 1986), pp. 90-2)

In reply to the question whether Her Majesty's Government will apply for coupons offered in the recently announced provisional settlement of

the US anti-trust class action which arose out of the collapse of Laker Airways, the Secretary of State for Transport wrote:

No, Sir. As my right hon. and learned Friend the then Secretary of State for Trade and Industry explained to the House on 11 December [see UKMIL 1985, p. 483], the Government's view is that the unilateral application of United States' anti-trust law to air services operated under the United Kingdom-US Air Services Agreement (Bermuda 2) is not compatible with the United Kingdom's rights under the agreement and is damaging to the trading interests of the United Kingdom. Since the Government therefore consider that the bringing of the class action is incompatible with our rights under Bermuda 2, there can be no question of Government Departments benefiting from the settlement.

(HC Debs., vol. 90, Written Answers, cols. 518-19: 29 January 1986)

In reply to the question what steps have been taken to investigate the impact on UK high technology exports of the attempted imposition of US export regulations by US subsidiary companies, the Minister for Information Technology wrote:

The United Kingdom remains firmly opposed to extraterritorial United States re-export controls and to the implied claim of the United States to jurisdiction in the United Kingdom. It is not possible to measure the impact of the imposition of such controls by United States subsidiaries. Companies with difficulties should approach the Department for advice.

(Ibid., vol. 92, Written Answers, col. 623: 27 February 1986)

In reply to a question about steps taken to prevent the infringement of UK sovereignty by the operation of US controls on exports from the UK of goods, including components and technology, the Minister of State, Department of Trade and Industry, wrote:

My right hon. Friend the Secretary of State and I continue to emphasise to the United States Administration the Government's objections to United States claims to extraterritorial controls over exports and to warn of the damaging consequences to our mutual interest of attempts to enforce such claims in the United Kingdom. We continue to make efforts to prevent or resolve problems arising from such claims under the consultation arrangements agreed by the United Kingdom and the United States Governments in November 1984. Since 1983 we have taken up about 20 cases with the United States authorities regarding re-export controls. In 1982, directions under the Protection of Trading Interests Act were made to prohibit seven United Kingdom firms from complying with the United States embargo on exports and re-exports of United States origin goods and technology destined for the west Siberian pipeline project in the USSR.

(Ibid., vol. 93, Written Answers, cols. 353-4: 10 March 1986)

The following press notice was issued by the Department of Trade and Industry on 20 March 1986:

Paul Channon, Secretary of State for Trade and Industry, today (20 March)

announced that he has given directions under Section Two of the Protection of Trading Interests (PTI) Act 1980.

These directions apply to two anti-trust private suits brought against British Airways, British Caledonian and others in the US courts. They prohibit compliance with requirements to furnish commercial documents in the UK or commercial information without the consent of the Secretary of State.

Leon Brittan, the then Secretary of State for Trade and Industry, made it clear in Parliament on 11 December last year that the government would not hesitate to use its powers under the PTI Act in relation to further anti-trust suits against UK airlines concerning air services operated under the Bermuda 2 agreement between the UK and US governments. Mr Channon considers that Section Two directions are now necessary in relation to new anti-trust private suits being brought against BA, BCal and others.

The press notice contained the following 'Notes to Editors':

1. The Protection of Trading Interests Act 1980 contains provisions enabling the Secretary of State to counter the measures taken or proposed under the law of another country which would damage the trading interests of the UK. It also provides that the Secretary of State may prohibit compliance with certain requirements of a court or authority of another country seeking commercial documents or information located outside that country.

2. The powers of the PTI Act were last exercised in 1983 and 1984. An Order and Direction were made under Section One in 1983 preventing persons in the UK from complying with any substantive requirements or prohibitions under the main US anti-trust legislation in relation to agreements concluded by UK airlines relating to Bermuda 2 air services. These are still extant. A direction under Section Two was also made in 1984 in relation to the Laker class action preventing airlines from complying with requirements to produce documents held in the UK. This direction expired on 19 March 1986 when the Laker class action was finally settled.

(Text provided by the Foreign and Commonwealth Office)

In reply to the question addressed to the Secretary of State for Foreign and Commonwealth Affairs

. . . what is his policy towards the acquisition for his Department's use, through the Central Computer and Telecommunications Agency or otherwise, of computers and equipment supplied by companies which seek to impose extra-territorial United States controls on their United Kingdom staff or on non-Government United Kingdom customers or on exports from the United Kingdom,

the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The Foreign and Commonwealth Office does not accept any extra-territorial constraints when purchasing such equipment.

(HC Debs., vol. 96, Written Answers, col. 33: 21 April 1986)

In reply to a question on the same topic, the Prime Minister, Mrs Margaret Thatcher, stated:

In general we reject United States claims to extraterritorial jurisdiction in the United Kingdom.

(*Ibid.*, col. 169)

In reply to the question

Whether [Her Majesty's Government] will ensure that US anti-trust legislation does not prevent the North Sea oil industry from implementing voluntary production cuts, and whether they do not now consider it to be in the national interest to institute multilateral discussions on how best to stabilise the oil markets,

the Minister of State, Scottish Office, wrote in part:

HMG would not accept that the activities of UK companies engaged in the development of UK resources could fall within US jurisdiction.

(HL Debs., vol. 473, col. 1066: 21 April 1986)

In reply to a question, the Secretary of State for Trade and Industry wrote:

During my visit, I made clear to the United States Secretary of Commerce our continuing strong objections to extraterritorial United States re-export-controls. I referred similarly to the extraterritorial aspects of the new distribution licence regulations. The United States authorities are well aware of our views on Systime's alleged violations of United States re-export-controls, and on the cutting off of United States supplies to United Kingdom firms who refuse to give re-export undertakings.

(HC Debs., vol. 97, Written Answers, col. 30: 6 May 1986)

In a letter to a member of the public, who had enquired about the international jurisdiction principles applicable to direct taxation and in particular about unitary taxation, Mr B. E. Cleese, Principal Assistant Solicitor, Inland Revenue, wrote on 2 June 1986 in part:

As a general rule, we take the view that the international jurisdictional principles which are applicable in relation to direct taxation are those set out in paragraphs 16-22 of the 1977 Report of the OECD Committee on Fiscal Affairs and embodied in the Model Convention annexed to that Report. As I am sure you are aware, one of the constant complaints about the method of unitary taxation known as world-wide combined reporting, which are made by the United Kingdom government and other OECD and EC Members, is that it breaches the internationally accepted principles of the OECD Report.

The problem with reliance on international law as such is that its principles are not well related to the exercise of fiscal jurisdiction. While the 'nationality principle' would permit a state to tax its own subjects on activities wherever in the world they are conducted (and some states, notably the USA and USSR, do exercise a taxing jurisdiction on this basis), the 'territorial principle', which would limit a state to taxing non-nationals on activities conducted on its own territory, does not go far enough for the purposes of most states. As the OECD Report makes clear, it is the distinction between residents and non-residents, rather than between nationals and non-nationals that most states make in order

to differentiate between those that are taxed on the basis of world-wide activities and those whose taxation is limited to activities or sources of income within the state. Though having said that, the nationality principle is of prime importance in relation to non-discrimination provisions.

It will, I think, be apparent from what I have said that the governments opposing unitary taxation by state administrations in the USA have concentrated on the OECD principles because of their greater relevance to fiscal jurisdiction and not least because the USA have themselves adhered to those principles, both as a member of the OECD and as a party to many double taxation conventions based on the OECD Model. In these circumstances an appeal to international law would, it is thought, only serve to confuse the issue and perhaps introduce an area of argument in which the principles to be applied are not as clear cut and their relevance to taxation is not established.

(Text provided by the recipient)

In the course of a speech to the American Bar Association given in Washington on 30 June 1986, the Attorney-General, Sir Michael Havers, stated:

We are beginning to see the need for international arrangements to prevent abuse of bank secrecy legislation. The laundering of money derived from drug trafficking and all kinds of fiscal crimes are facilitated by the secrecy laws of offshore financial centres. I know this has been of long-standing concern to your authorities and numerous provisions have been added to your banking and tax laws to try to limit the abuse. But national laws cannot be successful without international co-operation. Indeed, national laws which attempt unilaterally to regulate a problem offshore will very likely conflict with other countries' view of their own national jurisdiction.

This is what happened in the Caribbean. There are United Kingdom territories in the Caribbean which provide offshore banking facilities to a great variety of Americans—not all of them honourable men. The law enforcement agencies suspected that huge sums of drugs money were being laundered in these offshore centres. You will be aware of the case in 1983 where the Nova Scotia Bank was ordered by the US courts investigating a narcotics-related case to divulge information about its banking in the Cayman Islands. The territory's law forbade it to do so. When the bank refused, the court ordered fines on its operations in the USA. This prompted the UK and US Governments in the context of the extraterritoriality talks then being held to agree to talks to try and reach a settlement acceptable to all parties involved for dealing with narcotics cases in future.

The result was the trilateral Narcotics Agreement which was signed in July 1984. The agreement provides the US authorities with access to documentary information in the Cayman Islands relating to offences connected with drug trafficking. It establishes a procedure whereby, by applying to the Cayman Attorney General by means of a 'certificate', the US Attorney General can obtain documents for use in drugs-related cases. Since the agreement has entered into force, the US Attorney General has issued 39 'certificates'. Evidence produced in response has been instrumental in furthering federal investigation into several hundred million dollars of drugs trafficking. Several notorious drugs offenders have been put behind bars as a result.

For our part we are grateful to the Cayman Islands for the co-operative way in which they and your Department of Justice have made this agreement work. And we are delighted that it has been possible to make a substantial contribution to the reduction of trafficking in the Caribbean region.

I am glad to say that a similar agreement will be signed any day in respect of the Turks and Caicos, and that arrangements will also be made for the British Virgin Islands, Monserrat and Anguilla.

The 1984 Cayman Islands Narcotics Agreement is an example of successful international co-operation. It is limited to the provision of information for drug offences. But it has led to the negotiation of a full-scale Mutual Legal Assistance Treaty in criminal matters between the United Kingdom, the Cayman Islands and the United States. Again, this Treaty is to be signed any day now.

What is mutual legal assistance? It's a stolid, unglamorous phrase which, for the purpose of the Cayman Islands Agreement, is defined as including for example the provision of documents and other written or oral evidence; the service of documents; locating persons; transferring persons in custody for giving evidence; executing requests for searches and seizures; immobilising criminally obtained assets; and assistance in proceedings related to forfeiture, restitution and the collection of fines. This is not the stuff of tabloid headlines, but, as every lawyer knows, it is the essential *apparatus* for international co-operation. We expect the agreement to be enormously useful in aiding investigations into drugs offences and commercial frauds.

Later in his speech the Attorney-General stated:

It is scarcely necessary to say that in spite of the apparent lowering of barriers between States by the ease of modern communications, the international community remains one which is made up of independent sovereign States. Each has its own separate legal system, or, as in the case of both our countries, more than one legal system. What I am advocating by way of international co-operation is not a kind of legal invasion whereby the jurisdictional boundaries of each country will be swept aside and the laws and policy of one country will be enforced in another. International legal co-operation does not infringe the principle that the Courts of one State will respect the jurisdiction of others and will impose limitations on their own.

I am sure you are well aware of the differences that exist between our two countries on the subject of extraterritoriality—or, 'long-arm jurisdiction'. Going by the principle that 'The more we love our friends, the less we flatter them', I have to emphasize that we maintain our firm objections to the purported application in the UK, without our agreement, of the substantive law and economic policy of the United States—law and policy which of course never come near our Parliament for its consent or for that of the Government. The right course is not confrontation but co-operation. We have noted with appreciation that the US Government has sought to meet some of our concerns about extraterritoriality in deciding to limit the recent measures against Libya to overseas branches, not subsidiaries, of US banks and then only to US dollar denominated accounts in those branches. More importantly, we are beginning to see that the adoption of mutually agreed mechanisms for legal assistance is one way out of the extraterritoriality conflict. It may be that legal assistance treaties will be the forerunner

for greater co-operation over a wide range of areas which today cause us problems over extraterritoriality.

...

I have my doubts whether we should ever be able to reach Anglo-American agreement on the international legal principles governing jurisdiction. But I have great optimism about our ability to agree upon practical means of co-operation which will prevent criminals from using jurisdictional barriers in order to evade justice and which will enable us together to fight the battle against international crime.

(Text provided by the Foreign and Commonwealth Office)

In the course of an *amicus curiae* Brief filed before the Supreme Court of the US in the October Term 1986, the Government of the UK stated:

C. SEVERAL PRINCIPLES SHOULD GUIDE A COURT IN EXERCISING COMITY

1. *A Court Should Not Lightly Disregard Foreign States' Enactments of Defensive Laws*

The Republic of France, at least 13 other nations¹⁶ and the United Kingdom have all enacted defensive legislation with respect to foreign exercises of jurisdiction within their territories. Section two of the U.K. Protection of Trading Interests Act 1980, c. 11 ('P.T.I.A.') deals specifically with documents and information required by overseas courts and authorities. That section provides, *inter alia*, that the Secretary of State may by order prohibit compliance with requests for documents or information to be used in foreign legal proceedings when furnishing such information 'infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to' its sovereignty, security, or relations with the government of any other country. It differs from the corresponding French law insofar as it is not self-executing and applies to very few situations in which foreign courts attempt to assert jurisdiction over persons and conduct in the United Kingdom. Since its adoption in 1980, this section of the Act has been invoked in relation to only two different matters. The Secretary of State issues a direction only after determining that vital U.K. interests in maintaining its territorial sovereignty are seriously threatened by an exercise of foreign jurisdiction, and after carefully weighing the potential effect on relations with the country concerned.

The P.T.I.A. is a self-protective measure designed to assure that this sovereign policy of the United Kingdom is respected. Consistent with the American act of state doctrine, the P.T.I.A. should not be subject to review, discount or attack by a U.S. court.

'[T]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.'¹⁷

¹⁶ See Restatement (Revised) § 437, Reporters' Note 1 (Tent. Draft No. 7, April 10, 1986). To the best of our knowledge, these nations have not, in peacetime, ever repudiated the territorial preference for resolving jurisdictional disputes, even in situations where this means foregoing their own claim to jurisdiction.

¹⁷ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). This Court further opined in a case involving a conflict between federal law and the law of a state of the United States, that any supervised

United Kingdom courts are similarly disinclined to examine a foreign government's motives for promulgating laws. In *Settebello Ltd. v. Banco Totta & Acores*, [1985] 2 All E.R. 1025, Megaw, L.J., of the Court of Appeal stated:

'The English court will not exercise its discretion to invite the judicial authorities of a friendly foreign state to use its powers to assist in the obtaining of evidence from a witness residing in that state, or in another friendly foreign state, directed toward seeking to establish what were the motives of [the foreign state's law promulgating body] in deciding on and publishing that law.'¹⁸

The United Kingdom is entitled to exercise its sovereign power within its jurisdiction, and it is entitled to protect that exercise by the sovereign act of promulgating defensive legislation. The Republic of France, too, in enacting its defensive law, has engaged in an exercise of sovereign power. United States courts should not lightly reject such expressions of sovereign authority. A consistent application of the act of state doctrine will enhance mutual co-operation and will also render invocation of the P.T.I.A. much less necessary.

(Supreme Court of the US: *Société Nationale Industrielle Aérospatiale and Société de Construction d'Avions de Tourisme v. United States District Court for the District of Iowa*, October Term 1986. Brief of the Government of the UK as *amicus curiae* in support of petitioners, pp. 12-14)

Sections 159 and 160 of the Financial Services Act 1986 (1986 c. 60) provide criminal penalties for the issuing within the UK of advertisements offering unlisted securities for sale without the delivery of a prospectus to the Registrar of Companies. Section 207 (3) of the same Act reads:

For the purposes of this Act an advertisement or other information issued outside the United Kingdom shall be treated as issued in the United Kingdom if it is directed to persons in the United Kingdom or is made available to them otherwise than in a newspaper, journal, magazine or other periodical publication published and circulating principally outside the United Kingdom or in a sound or television broadcast transmitted principally for reception outside the United Kingdom.

Section 54 of the Finance 1985 (1985 c. 54) permits the UK to withdraw tax credits from parent companies situated in States applying unitary taxation. On 18 December 1986 Her Majesty's Government issued the following statement in this respect:

On 5 September 1986 the British Government issued a statement [not reproduced] welcoming the passage of legislation in California to limit the use of worldwide unitary taxation. At the same time it expressed reservations about some aspects of the legislation and restated its objective of achieving a comprehensive solution to the problem.

Since then the Government has discussed developments in California with senior Parliamentarians and representatives of British industry. And the United States Administration, in testimony to Congress, has stated that, while a final regulation of conduct within a state's territory which is predicated upon clear state policy should not be subject to attack. *Southern Motors Carriers Rate Conference, Inc. v. United States*, — U.S. —, 105 S.Ct. 1721 (1985).

¹⁸ *Id.* at 1031.

resolution to the unitary tax problem has not yet been achieved, such significant progress had been made that federal legislation, or a solution by amendment of the United States–United Kingdom Double Taxation Treaty, would not be appropriate at this stage.

The British Government shares the concerns of the United States authorities that, under the Californian legislation, a foreign company should have to pay a substantial election fee in order not to be taxed by the state on its foreign income; and, further, that in three states worldwide unitary taxation remains on the Statute Book. Over the coming months it will continue to work with British business interests for improvements in the Californian legislation, for acceptable arrangements for administering the new law and for legislative change in the remaining unitary states.

The British Government welcomes the support which the Federal Administration is giving (for example, through the filing of *amicus curiae* briefs) to companies presently involved in unitary tax court cases brought against the Californian tax authorities. It will itself continue to support such litigation.

In recognition of the progress which has been made in the last year towards resolving the unitary tax issue, the British Government is not proposing to take action under Section 54 of the Finance Act 1985 for the present. Equally, however, in view of the further progress that is necessary, it does not intend to recommend to Parliament that Section 54 should be repealed. Both the British Government and the United States Administration will continue to keep developments under careful review.

(HC Debs., vol. 107, Written Answers, col. 667: 18 December 1986)

Part Eight: IV. *State territory and territorial jurisdiction—regime under the Antarctic Treaty*

The following question was asked in the House of Lords:

To ask Her Majesty's Government what is their reaction to the remarks of the Argentinian Minister of the Interior reported on the 26th May to the effect that a new governor has been chosen by the President of Argentina for Tierra del Fuego, Antarctica and the South Atlantic Islands in order 'to prepare the territory for provincial status so that the sovereign rights of the people would be established'.

In reply, the Minister of State for Defence Procurement, Lord Trefgarne, said:

... we are aware of the Argentine Minister of the Interior's remarks. They have no significance for our sovereignty over the Falkland Islands; South Georgia and the South Sandwich Islands; or the British Antarctic Territory, which remains unaffected. Under the terms of the Antarctic Treaty, activities by treaty states, of which Argentina is one, have no effect on sovereignty.

(HL Debs., vol. 477, col. 277: 25 June 1986)

Part Nine: I. A. *Seas, waterways, ships—territorial sea—delimitation*

On 27 March 1986, in the UN Security Council, the UK representative, Mr Maxey, stated:

But what is quite clear, and this is not challenged or inconsistent with the new Convention on the Law of the Sea, no State is entitled to claim territorial waters that extend beyond 12 miles from their coast, much less to shut off large areas of the high seas. That is what Libya has attempted to do in the Gulf of Sidra; practically no State has recognized its claim, and many have specifically denied its validity.

(S/PV. 2670, p. 72)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The question of the extension of the territorial sea is under active consideration taking into account all the relevant factors.

(HL Debs., vol. 483, col. 352: 18 December 1986)

Part Nine: I. B. 1. Seas, waterways, ships—territorial sea—legal status—right of innocent passage

(See also Part Nine: VII. A. 1. (item of 27 March 1986), below)

In reply to a question, the parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

All foreign vessels enjoy under international law the right of innocent passage through territorial waters.

(HC Debs., vol. 107, Written Answers, col. 121: 9 December 1986)

Part Nine: I. B. 2. Seas, waterways, ships—territorial sea—legal status—regime of merchant ships

(See Part Nine: XV. D., below)

Part Nine: I. B. 5. Seas, waterways, ships—territorial sea—legal status—bed and subsoil

(See also Part Eight: II. A. (item of 17 July 1986), above)

In a press release in February 1986, the Crown Estate Office in Edinburgh announced that it had appointed a firm of chartered surveyors to manage its 'foreshore and seabed estate' on the east coast of Scotland from Fifeness to Fort George. In an explanatory note attached to the press release it was stated, *inter alia*:

All seabed lying below mean low water (or spring in Scotland) is Crown Estate property as far as the limit of territorial waters.

(Text provided by Professor D. R. Denman)

Part Nine: III. Seas, waterways, ships—internal waters, including ports

In reply to a question on the subject of Libya's claims over the Gulf of Sirte, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We, in common with our EC partners, take the view that the Libyan claim to sovereignty over the whole of the waters of the Gulf of Sirte is contrary to international law. In a Note delivered to the Libyan authorities on behalf of the member states of the European Community on 24 September 1985 the presidency made this clear following recent Libyan regulations on merchant shipping.

(HC Debs., vol. 91, Written Answers, col. 506: 13 February 1986)

At a press conference given by the Foreign and Commonwealth Office on 25 March 1986, the following statement was made:

HMG did not accept Libya's claim that all the waters enclosed by the Gulf of Sirte were territorial waters. To HMG's knowledge this claim was not accepted by any other state. Further, HMG did accept the right of the United States to exercise in international waters and its right to self-defence. Spokesman recalled that the EC Presidency had protested to the Libyan authorities in September last year on behalf of the (then) 10, over the introduction of restrictions in the Gulf of Sirte.

(Text provided by the Foreign and Commonwealth Office)

Following the movement of a Spanish warship into waters in the Bay of Algeciras claimed by the UK, the following statement was made after a press conference at the Foreign and Commonwealth Office on 2 April 1986:

... the British Ambassador in Madrid had raised the matter with the Spanish Ministry of Foreign Affairs yesterday and that further to that a senior member of the Ambassador's staff had delivered an aide-memoire at the MFA this morning. Responding to questions about the aide-memoire, Spokesman confirmed that this was a protest. Asked about the original incident, Spokesman said he understood that on 20/21 March the Spanish aircraft carrier *Dedalo* entered Gibraltar waters and, without prior notice or permission, launched two helicopters into Gibraltar airspace. This was particularly dangerous given the proximity of Gibraltar Airfield. To question about previous Spanish incursions, Spokesman replied that incursions had occurred in the past. Some of these were minor and did not always warrant representations. Representations were made either in response to a particularly clear incursion or a series of such incursions in close succession.

Following a later press conference, on 3 April 1986, the following statement was issued:

... the Spanish Ministry of Foreign Affairs had this morning handed to the British Embassy in Madrid an aide-memoire which set out the Spanish legal position. We would be considering this response, but believed that our own position had been adequately protected. In reply to further questions, Spokesman said that the British position was that Gibraltar generated its own territorial waters. We took the view that all territories generated their own territorial waters, a view widely held internationally.

(Ibid.)

In reply to a question on the subject of this incident, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The Spanish aircraft carrier *Dedalo* entered Gibraltar waters at 2344 hours on the night of 20–21 March and departed 15 minutes later at 2359 hours. During that time two helicopters were launched from the vessel. Her Majesty's embassy in Madrid was instructed to protest to the Spanish Government about this incident. This was done after the Easter holiday on 2 April. A Spanish reply was received on 3 April. I am satisfied that the United Kingdom's position has been properly safeguarded.

(HC Debs., vol. 95, Written Answers, cols. 163–4: 10 April 1986)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

Prior diplomatic clearance is required for visits of foreign warships to British ports.

(Ibid., vol. 107, Written Answers, col. 121: 9 December 1986)

Part Nine: IV. *Seas, waterways, ships—straits*

In reply to a question about the application of the Montreux Convention to aircraft carriers through the Bosphorus and the Dardanelles, the Minister of State, Foreign and Commonwealth Office, wrote:

The application of the provisions of the Montreux Convention have from time to time been discussed with the Turkish Government. We have taken the view that the convention applies to aircraft carriers and that passage of such ships through the straits is not compatible with the convention. This view is not shared by all of the parties, in particular the Turkish Government.

(HL Debs., vol. 472, col. 498: 10 March 1986)

In reply to a further question on the same subject, the Minister wrote:

The Soviet authorities are aware of our view that passage of aircraft carriers from the Black Sea to the Mediterranean is not compatible with the terms of the Montreux Convention.

(Ibid.)

Part Nine: VII. A. 1. *Seas, waterways, ships—the high seas—freedom of the high seas—navigation*

(See Part Nine: VII. D. and Part Fifteen: I. B., below)

In reply to a question from the Leader of the Opposition, the Prime Minister, Mrs Margaret Thatcher, stated in the context of US military action in the Gulf of Sirte:

Let me make it clear that United States ships and aircraft were operating in international waters and airspace and they have every right so to do. It is important that international waters and airspace be kept open and we support the United States right so to operate.

(HC Debs., vol. 94, col. 782: 25 March 1986)

On 27 March 1986, in the UN Security Council, the UK Permanent Representative to the UN in New York, Sir John Thomson, referred to the above incident in which Libyan aircraft attacked US aircraft over the Gulf of Sirte and continued:

Any breach of the peace is regrettable. The situation before us today is doubly regrettable because it stems from the flouting of fundamental principles. The main principle at stake is the right to freedom of navigation in international waters. This is a principle to which my Government has from time immemorial attached fundamental importance. As I have said on a previous occasion in this Council: as a maritime nation we are committed to freedom of navigation, including innocent passage through territorial seas. We deplore any unjustified threat to, or action against, navigation, whenever and wherever it occurs.

I stress that this principle, together with freedom of air traffic in international air space, is not restricted to the Mediterranean or to any other part of the world. It is unacceptable for any nation to arrogate to itself part of the high seas which are *res communis*.

It is well known that Libya has eccentric border policies which cause trouble to its neighbours in the south as well as to those in the north. In the Mediterranean Sea its neighbours are not just the countries which occupy the littoral on either side of it, but the whole international community. We all have a right to traverse international waters and no country has a right to arrogate these waters exclusively to itself. It is as if a landowner were to close off a public road close to his estate. Such an action damages the public at large.

That is the situation which underlies our present problem. The act, as it were, of closing the public road or arrogating international waters is not only illegal, but also provocative. To declare 'a line of death' is an attempt to intimidate the ordinary users of the public road. There is scarcely a country in the world that supports this 'line of death'. The vast majority of countries have consistently refused to acknowledge it and many have indeed made specific protests. I refer, for example, to the protest made in September last year by the presidency of the European Communities on behalf of its member States. This was a formal protest to the Libyan Government over the introduction of illegal restrictions in the Gulf of Sirte, or Sidra. The members of the European Communities re-affirmed their rejection of Libyan claims to sovereignty over the waters extending beyond the legitimate limits of the territorial sea.

(S/PV. 2669, pp. 32-5)

On 29 May 1986, the Foreign and Commonwealth Office issued the following statement about the sinking of a Taiwanese fishing vessel by an Argentine warship in the South Atlantic:

We greatly deplore the Argentine use of force against an unarmed vessel on the high seas which was both unjustified and excessive. We are shocked at the tragic loss of life and the sinking of the vessel. The British Government rejects Argentina's claim to exercise jurisdiction over the waters in question: this action amounts to an attempt to pursue a sovereignty claim by force.

(Text provided by the Foreign and Commonwealth Office)

On 15 July 1986, the Governments of the UK and the USSR concluded

an Agreement concerning the Prevention of Incidents at Sea beyond the Territorial Sea. Article 2 of this Agreement reads in part as follows:

The Parties recognise that their freedom to conduct operations beyond the territorial sea is based on the principles established under recognized international law and codified in the 1958 Geneva Convention on the High Seas.

(TS No. 5 (1987); Cm. 57)

In the course of a speech in the UN Security Council on 31 July 1986 on the subject of US activity in Nicaragua, the UK Permanent Representative, Sir John Thomson, stated:

... I do wish to reaffirm my Government's support for the International Court of Justice and for the rules of international law which it is the task of the Court to uphold. We have very strong views on these matters. To illustrate, I will quote a few sentences from my statement in this Council on 4 April 1984. I said:

'I wish to make it quite clear that the United Kingdom deplores the mining of Nicaraguan waters. . . . Our position is well known and consistent: as a maritime nation, we are committed to freedom of navigation, including innocent passage through the territorial sea and access to foreign ports for peaceful trade.

'We deplore any threats to navigation, whenever and wherever they occur.'
(S/PV. 2529, pp. 77, 78)

(S/PV. 2704, p. 47)

Part Nine: VII. D. Seas, waterways, ships—the high seas—visit and search
(See also Part Fourteen: III. (item of 5 February 1986), above)

In reply to a question on the subject of action taken against British shipping in the Gulf, the Minister of State, Foreign and Commonwealth Office, wrote:

The United Kingdom upholds the general principle of freedom of navigation on the high seas. However, under article 51 of the United Nations charter a state such as Iran, actively engaged in an armed conflict, is entitled in exercise of its inherent right of self-defence, to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict. This is an exceptional right: if the suspicions prove to be unfounded and if the ship has not committed acts calculated to give rise to suspicion, then the ship's owners have a good claim for compensation for loss caused by the delay.

Our representatives in Tehran are in touch with the Iranian authorities as to why the British registered vessel Barber Perseus was stopped for a check of the ship's manifest on 12 January.

(HC Debs., vol. 90, Written Answers, col. 426: 28 January 1986)

In the course of a debate on the same subject, the Minister of State, Mr Timothy Renton, stated in part:

Regarding the international legal position, we uphold strongly the general principle of freedom of navigation on the high seas. Iran may be entitled under

article 51 of the United Nations charter to exercise an inherent right of self-defence by stopping and searching foreign merchant ships on the high seas. However, that is an exceptional right, and can be used only if there are reasonable grounds to suspect a vessel of taking arms to the other side for use in a conflict. (Ibid., vol. 91, col. 278: 5 February 1986)

In reply to a further question asking for confirmation that it would be against the UK's long-term interests to abolish the right of visit and search, the Minister of State remarked:

Yes; I take my hon. Friend's point. None the less, we are anxious that the Iranians should act extremely cautiously. Our position is based on the general principle of freedom of navigation and the United Nations charter.

(Ibid., col. 279)

Part Nine: VII. G. *Seas, waterways, ships—the high seas—pollution*

(See Part Nine: XV. D., below)

Part Nine: VII. H. *Seas, waterways, ships—the high seas—jurisdiction over ships*

(See Part Seven: II. C., above and Part Nine: XV. D., below)

Part Nine: VIII. *Seas, waterways, ships—continental shelf*

(See also Part Eight: I. A. and Part Nine: I. B. 5., above, and Part Nine: IX. (material relating to the Falkland Islands), and Part Nine: X., below)

In a press release in February 1986, the Crown Estate Office in Edinburgh announced that it had appointed a firm of chartered surveyors to manage its 'foreshore and seabed estate' on the east coast of Scotland from Fifeness to Fort George. In an explanatory note attached to the press release it was stated, *inter alia*:

The natural resources of the United Kingdom Continental Shelf, other than in respect of oil, gas and coal, also form part of the Crown Estate.

(Text provided by Professor D. R. Denman)

In 1917, the British-registered ship *Glenartney* was torpedoed in the Mediterranean when on a voyage from Singapore to the UK with a cargo which included tin and wolfram. The UK Board of Trade paid for the loss under wartime insurance arrangements. The wreck lies about 17 nautical miles from Cap Bon, Tunisia. On 17 March 1986, a Norwegian-registered vessel, the *Wildrake*, was attempting to salvage the cargo (pursuant to a contract with an English company which in turn had a salvage agreement with the Secretary of State for Transport as successor to the Board of Trade) when a Tunisian patrol vessel ordered the *Wildrake* to proceed to Bizerta under arrest, being suspected of conducting operations

within Tunisian jurisdiction without the required authorizations. The crew, which included fourteen British nationals, was detained in Tunisia for a time. The *Wildrake* was released pursuant to a settlement between the Tunisian Customs and its owners signed on 31 March 1986.

An edition of the *London Standard* on 7 April 1986 reported that the Department of Transport had sent a telex to the salvage company in which it was stated: '... while the wreck may be on the Tunisian continental shelf it is not in Tunisian territorial waters and the Tunisians do not have any jurisdiction over the wreck.'

In reply to the question

In the light of Clause 9 of the Channel Tunnel Bill, whether at present 'the law of England' does not apply to the relevant parts of the British continental shelf, including its subsoil, and if it does not, what law does apply,

the Parliamentary Under-Secretary of State, Department of Transport, wrote:

Statute law does not apply below low water mark unless express provision is made. Some aspects of English common law apply to the waters and seabed adjoining England within territorial waters. Under international law the United Kingdom enjoys certain rights to exploit the continental shelf adjoining England outside territorial waters, and the Continental Shelf Act 1964 makes provision for the application of United Kingdom law to installations there. The purpose of Clause 9 is to ensure that English law and jurisdiction will apply to the tunnel system under the seabed as far as the frontier in the same way as they apply on land in the rest of England.

(HL Debs., vol. 474, cols. 1130-1: 13 May 1986)

[Clause 9 (1) of the Channel Tunnel Bill (No. 137) read as follows:

The tunnel system as far as the frontier, so far as not forming part of the United Kingdom before the passing of this Act, shall, as it becomes occupied by or on behalf of the Concessionaires working from England, together with so much of the surrounding subsoil as is necessary for the security of the part of the system so occupied, be incorporated into England and form part of the district of Dover in the county of Kent, and the law of England shall apply accordingly.]

In reply to the question

What in [Her Majesty's Government's view] is the status in international law of the various areas of continental shelf round the Svalbard Archipelago, the Minister of State, Foreign and Commonwealth Office, wrote:

In our view Svalbard has its own continental shelf, to which the regime of the Treaty of Paris of 1920 applies. The extent of this shelf has not been determined. (Ibid., vol. 477, cols. 1021-2: 3 July 1986)

In reply to the question

Whether, given Britain's treaty rights in the Svalbard Archipelago, [Her

Majesty's Government] consider the sectoral principle or the median line principle the appropriate one for application in relation to: (a) the waters, and (b) the continental shelf in the Barents Sea,

the Minister of State, Foreign and Commonwealth Office, wrote:

In our view, the use of median line principles would be appropriate.

(Ibid., col. 1022: 3 July 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The UK has not taken a view on the Chilean claim to a 350 nautical mile continental shelf around Easter Island.

(Ibid., vol. 478, col. 1005: 17 July 1986)

In a debate on the second reading of the Petroleum Bill, the Minister of State, Department of Energy, Mr Alick Buchanan-Smith, stated:

The provisions of the Bill are addressed to providing a framework that will control the safe and orderly abandonment of installations. The Bill will not set standards in the abandonment provisions. It will enable the Secretary of State to set standards covering such important matters as safety of operation and the other important matters to which my hon. Friend . . . referred, such as the extent of removal. My hon. Friend is probably aware that fishermen believe that international law requires complete removal, but that is not the Government's view. We believe that partial removal is possible under international law.

(HC Debs., vol. 106, col. 31: 24 November 1986)

In reply to a question concerning the obligation to remove oil and similar installations set up on the sea-bed, the Government Minister in the House of Lords wrote:

The UK is bound by the Geneva Convention on the Continental Shelf of 1958, including the provisions relating to the removal of disused oil installations. These provisions should be interpreted in the context of the convention as a whole and in a manner consistent with its object and purpose as well as with customary international law. In the view of HMG, total removal of installations is only required where this is necessary to prevent unjustifiable interference with other users of the sea.

(HL Debs., vol. 482, col. 919: 3 December 1986)

Part Nine: IX. Seas, waterways, ships—exclusive fishery zone

(See also Part Nine: X., below)

In the course of a debate on the subject of fish conservation in the waters around the Falkland Islands, the Minister of State, Foreign and Commonwealth Office, Baroness Young, was asked whether the UK 'should not apply customary law and extend fishing rights to the limit of the [protection] zone that we have declared'. She replied:

. . . we retain this right. Our aim is the establishment of an effective conserva-

tion and management regime in the South-West Atlantic. I believe, however, that we still need to look at establishing workable arrangements for fisheries conservation and management in the South-West Atlantic. The disposition of fish stocks makes it strongly preferable to apply conservation measures over a wide area of the South-West Atlantic extending beyond the waters around the Falklands. It is an international issue, and we believe that it requires an international solution.

(Ibid., vol. 479, col. 719: 29 July 1986)

At a press conference held on 13 August 1986, the Foreign and Commonwealth Office issued the following statement:

On 29 July the Soviet and Argentine Press reported that the Soviet Union and Argentina had signed a bilateral fisheries agreement in Buenos Aires on 28 July. We do not yet know the precise scope of the Agreement. HM Embassy in Moscow have asked the Soviet Government for a copy of the text. But HMG wish to make it clear that if this agreement purports to regulate fishing activity in the waters surrounding the Falkland Islands, it would have no basis in international law. British sovereignty over, and administration of, the Falklands confers on the British Government and the Falklands authorities the right to exercise fisheries jurisdiction over these waters. This right remains unaffected by the Soviet/Argentine fisheries agreement or any other bilateral fisheries agreement.

In reply to a question Spokesman confirmed that territorial waters around the Falkland Islands extended for three miles. He added that HMG retained the right to declare a unilateral exclusive fisheries limit but its aim was the establishment of an effective conservation and management regime in the South West Atlantic. HMG believed that a multilaterally-based arrangement offered the best prospect. In response to further questions, Spokesman said that discussions had taken place through the FAO and that Argentina had agreed to participate in the FAO study. This study was expected to be ready next month for circulating to fishing nations for their comments.

(Text provided by the Foreign and Commonwealth Office)

The following document, dated 29 October 1986, was issued by the Foreign and Commonwealth Office:

DECLARATION ON THE CONSERVATION OF FISH STOCKS AND ON MARITIME JURISDICTION AROUND THE FALKLAND ISLANDS

In order to create the necessary conditions for ensuring conservation of the fish stocks around the Falkland Islands, the British Government hereby declares that:

the Falkland Islands are entitled under international law to fishery limits of a maximum of 200 nautical miles from the baselines from which the breadth of the territorial sea of the Falkland Islands is measured.

The maximum extent of these limits is also subject to the need for a boundary with Argentina in areas where arcs of 200 nautical miles from Argentina and

the Falkland Islands overlap. In the absence of any agreement, the British Government hereby declares that:

the boundary is that prescribed by the rules of international law concerning the delimitation of maritime jurisdiction.

This declaration of limits is effective immediately.

Within these limits, legislative measures will be taken shortly in the Falkland Islands to ensure the conservation and management of living resources in accordance with international law. Such measures will be intended to ensure conservation of the stocks on an interim basis pending internationally agreed arrangements for the South West Atlantic fishing as a whole, and taking into account the best scientific evidence.

These measures will apply to a zone known as the Falkland Islands Interim Conservation and Management Zone (FICZ). The limits of the FICZ will be defined in the legislation and the effective date of the measures will be made known well in advance.

Approaches will be made as a matter of urgency to the states fishing around the Falklands, as well as to the Commission of the European Communities, about arrangements for the 1987 fishing season commencing on 1 February 1987.

The British Government has also given consideration to the related question of the continental shelf around the Falkland Islands in the light of the present state of international law, according to which rights to the continental shelf are inherent. The British Government hereby declares for the avoidance of doubt that:

The continental shelf around the Falkland Islands extends to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea of the Falkland Islands is measured or to such other limit as is prescribed by the rules of international law, including those concerning the delimitation of maritime jurisdiction between neighbours.

It will be for the authorities in the Falkland Islands to take legislative measures in order to implement this Declaration.

The following Proclamation, No. 4 of 1986, was issued by the Governor of the Falkland Islands on the same day:

INTERIM FISHERY CONSERVATION AND MANAGEMENT ZONE

IN THE NAME OF HER MAJESTY ELIZABETH II, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith,

BY HIS EXCELLENCY GORDON WESLEY JEWKES ESQUIRE, Companion of the Most Distinguished Order of Saint Michael and Saint George, Governor of the Falkland Islands,

WHEREAS the Falkland Islands are entitled under international law to a fishery limit of a maximum of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured subject to the boundary with a neighbouring state prescribed by the rules of international law concerning the delimitation of maritime jurisdiction,

AND WHEREAS there is a need to conserve the living resources and to regulate on an interim basis fishing in the seas around the Falkland Islands,

NOW THEREFORE I, GORDON WESLEY JEWKES, acting in pursuance of instructions given by Her Majesty through a Secretary of State, do HEREBY PROCLAIM as follows:

1. There is established for the Falkland Islands an interim fishery conservation and management zone, hereinafter referred to as 'the zone'.
2. The zone will have as its inner boundary the outer limits of the territorial sea of the Falkland Islands and has as its seaward boundary the line formed by the circumference of a circle which has a radius of 150 nautical miles and its centre at Latitude $51^{\circ} 40' S$, Longitude $59^{\circ} 30' W$, except that between the points on that circumference situated at Latitude $52^{\circ} 30' S$, Longitude $63^{\circ} 19.25' W$ and Latitude $54^{\circ} 08.68' S$, Longitude $60^{\circ} 00' W$ the seaward boundary shall be a rhumb line.
3. The seaward boundary of the zone may be varied by means of a further Proclamation for the purpose of implementing any agreement or arrangement with another state or states or an international organisation, or otherwise.
4. Her Majesty will exercise the same jurisdiction in respect of the conservation of living resources and the management of fisheries in the zone as she has in respect of those matters in the territorial waters of the Falkland Islands subject to such provision as may hereafter be made by law for the conservation of living resources and management of fisheries within the said zone.
5. This Proclamation will become effective on the twenty-ninth day of October 1986.

Given under my hand and the Public Seal of the Falkland Islands at Government House, Stanley, Falkland Islands, this Twenty-ninth day of October in the year of Our Lord One Thousand Nine Hundred and Eighty Six.

G. W. Jewkes
Governor

On the same day the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, made the following statement on South Atlantic fisheries:

The Government are today taking steps to establish a Falkland Islands interim conservation and management zone. It will be generally of 150 miles radius from the Falkland Islands. At the same time we are declaring the entitlement of the Falklands, under international law, to a fisheries limit of 200 miles, subject to delimitation with Argentina. We are also confirming our rights to jurisdiction over the continental shelf up to the limits prescribed by the rules of international law.

The necessary legislative measures will be introduced shortly in the Falkland Islands. Our action is taken in agreement with the Governor and his Executive Council. We are informing the fishing nations, the Food and Agriculture Organisation, our allies and partners, the European Commission, the United Nations and other Governments concerned, including Argentina. Copies of the declaration have been placed in the Library of the House.

The House will know that the rapid increase in fishing in the south-west Atlantic, with its serious impact on fish stocks there, has aroused widespread concern. The Government share that concern and have been active in trying to meet it.

From the outset, the Government took the view that the problem would best be solved on a collaborative basis. Accordingly, as a result of a British initiative in March 1985, a study was launched last November at the Food and Agriculture Organisation. We gave it every support. We saw this as the first step to agreeing multilateral conservation and management arrangements under FAO auspices. In public, and directly to the Argentine Government, I made clear our view that a solution without prejudice to our respective positions on sovereignty could and should be found. However, some fishing nations have not co-operated fully with the FAO study, and its preparation has been delayed.

Pending completion of the study, we took steps to reduce by voluntary means the impact of the fishing effort in the 1986 season. We had hoped to extend these voluntary arrangements into 1987.

Argentina has pursued a different course, and her actions have undermined the multilateral approach. In particular, Argentina has embarked on aggressive patrolling more than 200 miles from Patagonia and within 200 miles of the Falklands. Unlawful use of force by Argentina led in one case to loss of life and the sinking of a vessel. Argentina has concluded bilateral fisheries agreements with the Soviet Union and Bulgaria. Through these agreements Argentina purports to exercise jurisdiction that is as a matter of law the entitlement of the Falkland Islands. These agreements are incompatible with the multilateral initiative.

In sum, the Argentine Government's recent actions show an indifference to conservation needs and a preference for obstruction rather than co-operation. The Government are determined that there should be adequate protection for the fishery. In view of the failure of Argentina to co-operate in a multilateral approach, we have therefore decided to establish unilaterally a conservation and management regime. We remain, however, ready to work for a multilateral arrangement, which would still be our preference, just as soon as that can be achieved. I have made this clear to the Argentine Foreign Minister and suggested to him that we should review how Britain and Argentina can co-operate to support conservation on a regional basis.

The legislation to be introduced by the Falkland Islands Government will take effect from 1 February 1987. Its aim will be to preserve the viability of the fishery. Fishing within the conservation zone will be licensed by the Falkland Islands Government. Licensing will reflect conservation needs. The Falkland Islands Government will use its own civilian fisheries protection vessels and a surveillance aircraft.

Revenue and costs will be for the Falkland Islands Government. The conservation zone for most of its circumference will be co-extensive with the protection zone. Our forces stationed at the Falklands will continue to deter Argentine aggression and maintain the integrity of the protection zone.

(HC Debs., vol. 103, cols. 323-4: 29 October 1986)

Later in the debate, the Secretary of State observed:

On the law of the sea, the 200-mile zone, within which the fishery conservation

zone is being established, does not depend on the convention. That has been accepted by the International Court of Justice. On the continental shelf and the question of delimitation on the south-western side, facing Argentina, we have taken account of the need for delimitation in the precise border of the zone that we have established. Beyond that it would be a matter for negotiation, which we hope can take place.

...

One factor that we took into account was the fact that Argentina had been making agreements of this kind with the Soviet Union and Bulgaria, purporting to exercise jurisdiction—as a matter of international law, however, it is the entitlement of the Falkland Islands—and making agreements that were incompatible with the multilateral initiative. Because of that, we felt obliged to take this measure unilaterally. We remain anxious to secure a multilateral conclusion if that is possible.

(Ibid., cols. 326–7, *passim*)

In the course of a debate in the House of Lords on the same subject, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

So far as concerns the water around South Georgia, the fishery is subject to existing international agreement—that is, the Convention on the Conservation of Antarctic Marine Living Resources. We continue to regard this agreement as having the potential to develop into a truly effective conservation regime. We shall continue to work with other likeminded commission members at next year's meeting, which takes place in October 1987. So far, the CCAMLR has introduced a ban on all commercial fishing within 12 nautical miles of South Georgia.

(HL Debs., vol. 481, col. 744: 29 October 1986)

In reply to a further question, the Minister of State observed:

The interim conservation zone is co-terminous with the Falkland Islands Protection Zone. We have claimed up to 200 miles but the actual area that will be licensed and will be patrolled will be of 150 miles radius. This is because most of the fishing is done within 150 miles radius and because it is coterminous with the Falkland Islands Protection Zone.

(Ibid., col. 745)

At a press conference held by the Foreign and Commonwealth Office on 30 October 1986, it was stated:

... HMG was claiming a fishery limit up to 200 miles from the Falklands but within that limit the Falkland Islands Government would legislate to establish the FICZ of 150 miles radius. Asked why the FICZ had been set at 150 miles, Spokesman said that the main fishing grounds were included within the FICZ and that it was much more practical and economic to patrol and police a 150-mile zone than a 200-mile zone.

(Text provided by the Foreign and Commonwealth Office)

On 29 October 1986, the UK Permanent Representative to the UN in New York, Sir John Thomson, delivered the following communication to the UN Secretary-General:

In his communication on the Falkland Islands annexed to my letter of 22 September 1986 (A/41/636), the Chairman of the United Kingdom delegation to the forty-first session of the General Assembly said that the British Government had been gravely concerned to hear that Argentina had recently concluded bilateral fisheries agreements with the Soviet Union and Bulgaria, which, on the Argentine interpretation, purport to extend to the waters around the Falklands. Sir Geoffrey Howe pointed out that this undermined prospects for a multilateral solution to the problem of the conservation of the south-west Atlantic fishery. These steps were taken with the evident intention of prejudicing matters in dispute between my government and the Government of Argentina. We have informed the parties concerned that these agreements are contrary to international law and that the British Government fully reserves its rights.

I have the honour, on instructions, to forward a copy of a declaration issued on 29 October by my Government following consultations with the Governor and Government of the Falkland Islands. My Government had hoped that it would be possible to secure multilateral arrangements under the auspices of the Food and Agriculture Organization of the United Nations for the 1987 fishing season. There is no longer a realistic prospect of achieving this aim. In the face of major increases in the fishing effort in the south-west Atlantic over the last three years, the threat to particular species and the limitations inherent in voluntary restraint arrangements as a means to manage the fishery, my Government has concluded that there is no alternative, if the fishery is to be conserved and managed in a responsible way, to declaring an interim management and conservation fishery zone around the Falklands.

My government wishes to stress that it regards the arrangements proposed in the declaration as interim, that a multilateral arrangement is the strong British preference and that we remain ready to work for it. We hope that it will be possible to review with Argentina how we can co-operate to support conservation on a regional basis.

(A/41/777, pp. 1-2)

On 21 November 1986, Sir John Thomson delivered a further communication to the UN Secretary-General, part of which read as follows:

The Permanent Representative of Argentina to the United Nations addressed separate letters to the Secretary-General on 30 October (A/41/784-S/18438) and 3 November (A/41/788-S/18441) following my Government's declaration on south-west Atlantic fisheries. I have the honour, on instructions, to submit my Government's response to the points contained in these letters.

In replying, I should like to take this opportunity to clear up any confusion there may be about the nature and extent of the action taken by my Government. The Declaration of 29 October was to the effect that the Falkland Islands are entitled under international law to fishery limits of a maximum of 200 nautical miles measured from the baseline, subject to the need for a boundary where there is less than 400 miles between the Argentine and Falkland coasts.

The Declaration stated also that within the entitlement to fishing limits

measures would be taken in the Falkland Islands to ensure the conservation and management of living resources in accordance with international law. Accordingly, and as envisaged in the Declaration, on 29 October the Governor of the Falkland Islands issued a proclamation declaring the Falkland Islands interim Conservation and Management Zone (FICZ). This extends 150 nautical miles from the centre of the Falkland Islands save in the south-west where the Zone stands back from the circumference of the circle and the boundary is made by a Rhumb Line. On 12 November, the Falkland Islands Legislative Council enacted a new fisheries conservation and management ordinance which makes provision for exercising fishery jurisdiction. The effect of the proclamation and the ordinance is that fishery jurisdiction will be exercised within the FICZ, but not outside it.

The Declaration of 29 October and the measures taken in the Falkland Islands scrupulously respect the rights which Argentina may legitimately claim under international law.

As the Declaration made clear, its purpose was to create the necessary conditions for ensuring conservation of fish stocks around the Falkland Islands. This was not, as the Argentine letters appear to allege, a pretext to bolster British sovereignty: the rights are ones which the Falkland Islands are entitled to under international law and that entitlement exists whether or not the rights are formally asserted. It is rather the Argentine Government which has sought to use the fisheries issue to advance its sovereignty claim. In doing so, it has interfered with shipping more than 200 miles from Argentina but less than 200 miles from the Falkland Islands: in some cases strafing fishing vessels, one of which sank, with loss of life. Such action increased tension and uncertainty and undermined the search for a multilateral solution, a concept that commands widespread international respect outside Argentina. My Government has repeatedly stated that multilateral arrangements should be established that are without prejudice to respective positions on sovereignty. By setting sovereignty aside, my Government sought a collaborative solution to the fisheries issues. By putting sovereignty centre stage Argentina has prevented such a solution.

(A/41/868, pp. 1-2; S/18473, pp. 1-2)

In reply to the question 'what are the implications of the extent to which the exclusive fishing zone around the Falkland Islands overlaps the 200-mile territorial limit claimed by Argentina for the possibilities of increased tension in the area', the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The boundaries of the Falkland Islands interim conservation and management zone fully respect the rules of international law governing the delimitation of maritime jurisdiction between neighbours. We therefore see no reason why the choice of the zone's boundaries should increase tension in the area.

(HC Debs., vol. 106, Written Answers, col. 646: 3 December 1986)

In reply to the question 'Whether it remains the view of Her Majesty's Government that the generation of a fishery zone by the Island of Gotland depends on the conclusion of negotiations concerning the boundaries of

such a zone', the Minister of State, Foreign and Commonwealth Office, wrote:

No. We would not regard the absence of an agreement as precluding the two Governments from establishing their respective zones by their own legislation within limits consistent with international law.

(HL Debs., vol. 483, col. 352: 18 December 1986)

Part Nine: X. Seas, waterways, ships—exclusive economic zone

(See also Part Nine: VIII., above)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

. . . it is plain common sense that conservation within a 200-mile economic and fishery zone around the Falkland Islands can best be achieved by co-operation among all those with an interest in orderly fishing in that region. That is why we have supported the initiative by the Food and Agriculture Organisation to put in place a multilateral fisheries regime. Our approach to this issue is highly practical. We want an effective multilateral regime, entirely without prejudice to our position on sovereignty. We shall of course continue to stand firmly by our commitments to the Falkland Islanders.

(Ibid., vol. 472, col. 1147: 20 March 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

There would be no advantage to the UK in declaring an Exclusive Economic Zone as we already have a 200-nautical mile fishery zone and an established continental shelf regime.

(Ibid., vol. 483, col. 352: 18 December 1986)

Part Nine: XII. Seas, waterways, ships—bed of the sea beyond national jurisdiction

(See also Part Nine: XIV. and XV. A.2., below)

On 30 August 1985, the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea adopted a declaration which read in operative part as follows:

The Preparatory Commission . . .

1. Declares that:

- (a) The only régime for exploration and exploitation of the Area and its resources is that established by the United Nations Convention on the Law of the Sea and related resolutions adopted by the Third United Nations Conference on the Law of the Sea.
- (b) Any claim, agreement or action regarding the Area and its resources undertaken outside the Preparatory Commission which is incompatible with the United Nations Convention on the Law of the Sea and its related resolutions shall not be recognized.

2. Rejects such claim, agreement or action as a basis for creating legal rights and regards it as wholly illegal.

(LOS/PCN/72)

The Chairman of the UK delegation to the Preparatory Commission, Mr H. G. Darwin, sent the following letter, dated 4 November 1985, to the Chairman of the Commission:

In your statement to the formal plenary session of the Preparatory Commission on 30 August, you said that it was your understanding that the draft declaration . . . commanded a large majority in the Preparatory Commission and that you therefore took it that the declaration had consequently been approved and adopted. You also noted that a number of delegations, while appreciating the preoccupations of that majority, could not give support to the declaration because of their concerns about some aspects of the substance and the effect of the declaration.

Since your statement was not followed by a discussion during which the views of delegations could be given and since we have the same position as others who did not support the declaration, I should like to take the opportunity by this letter to indicate the views of the Government of the United Kingdom on some points in connection with that text.

First, we have some difficulty in seeing how an action of this kind is within any of the powers or functions of the Preparatory Commission, set out in resolutions I and II relating to the United Nations Convention on the Law of the Sea of 10 December 1982.

Secondly, it will be recalled that General Assembly resolution 2749 (XXV) states, in paragraph 9, that an international régime applying to the area and its resources, including appropriate international machinery, is to be established by an international treaty of a universal character, 'generally agreed upon'. Given the objections clearly raised during the Conference to certain aspects of the Convention, and the continuing objections of a number of States interested in deep-sea mining, this has yet to be achieved. The decisions at the Conference and the outcome recorded in the Convention do not, in these circumstances, bind the States which did not accept them. The United Kingdom also did not vote for certain resolutions of the General Assembly, such as resolution 39/73 of 13 December 1984. It is not accepted that such activities on the sea-bed are illegal. In our view, despite the outcome of the Conference and the Convention, in the absence of a régime which is generally accepted and is thus likely to be effective, a State must retain its rights and may exercise its freedom of action relating to activities on the deep sea-bed and its resources.

The United Kingdom has attended the Preparatory Commission regularly and has urged consistently that it should work towards a régime for the sea-bed which could gain universal acceptance. We doubt if this action of the Preparatory Commission will have helped it to achieve an accommodation of differing viewpoints. We nevertheless hope that the Preparatory Commission can continue to work towards an acceptable sea-bed régime.

(LOS/PCN/74)

In reply to the question:

Whether the Kennecott Consortium, which includes British interests, and has

been granted a licence for exploration of the deep sea bed by the United States Government, can call upon the assistance of the United States Navy or the Royal Navy should their exploratory activities be interfered with by other parties who do not recognise the legality of licences issued otherwise than under the system established by the United Nations Convention on the Law of the Sea,

the Government Minister in the House of Lords wrote:

The licence to which the noble Lord refers was issued by the United States Government to a United States company acting on behalf of the Kennecott Consortium. That company will no doubt look to the United States Government on matters related to that licence.

(HL Debs., vol. 472, col. 618: 12 March 1986)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The period for signature of the law of the sea convention ended on 9 December 1984. Although it remains possible for us to accede to the convention at any stage, our fundamental objections to the proposed seabed mining régime remain.

(HC Debs., vol. 100, Written Answers, col. 335: 27 June 1986)

Part Nine: XIV. Seas, waterways, ships—international regime of the sea in general

In the course of a debate in the House of Lords to take note of the report of the Select Committee on the European Communities entitled 'External Competence of the European Communities' (*Parliamentary Papers*, 1984-5, HL, Paper 236), the Minister of State, Foreign and Commonwealth Office, Baroness Young, said:

The United Kingdom and the Federal Republic of Germany have not signed the [United Nations Convention on the Law of the Sea, 1982]. The European Economic Community has signed. But the director general in the legal service of the Commission, in evidence, said that action by the Community would require unanimity. Action by the Community is only possible in fields under its competence. Many topics in the United Nations Law of the Sea Convention are within national competence.

(HL Debs., vol. 470, col. 522: 27 January 1986)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

... we regard much of the [1982] convention as valuable, but we have objections to the proposed deep seabed mining régime. Even for states which have ratified or acceded to it, the convention comes into force only one year after deposit of 60 instruments of ratification or accession; only 32 such instruments have been deposited. But many states follow some of the practices laid down in the convention.

(HC Debs., vol. 106, Written Answers, col. 651: 3 December 1986)

Part Nine: XV. A. 2. *Seas, waterways, ships—ships—legal status—public ships other than warships*

(See also Part Five: VIII. B., above)

In reply to the question

What flag the new NATO research vessel 'Alliance' will fly, what will be the nationality of her crew, under what command she will come, and what will be her status in international law and in the domestic law of NATO members, the Minister of State for Defence Procurement wrote:

The 'Alliance' which will be based at La Spezia in Italy, will come under SACLANT's command. She will fly the German flag and her status in international law and in the law of NATO member countries will be that of a German registered Public Service Vessel. Her Master and First Mate will be German nationals, the remaining officers will be British, and the ratings will be Italian.

(HL Debs., vol. 479, col. 548: 25 July 1986)

Part Nine: XV. A. 3. *Seas, waterways, ships—ships—legal status—warships*

(See Part Five: VIII. B., above)

Part Nine: XV. B. *Seas, waterways, ships—ships—nationality*

(See also Part Nine: XV. A. 2., above)

In the course of a debate on the subject of the merchant service, the Minister of State, Department of Transport, Mr David Mitchell, stated:

I should like the House to be quite clear that the fact that over a period BP Shipping will be transferring bulk carriers to the Bermuda registry has in itself no direct implications for defence. These vessels will remain under the ownership and control of BP and will be available for requisition in time of tension or war by use of the Royal prerogative as readily as if they had remained on the United Kingdom register. These vessels will be on the Bermuda register, but will continue to fly the United Kingdom flag.

(HC Debs., vol. 90, col. 428: 22 January 1986)

Part Nine: XV. D. *Seas, waterways, ships—ships—jurisdiction*

(See also Part Seven: II. C., above)

In moving the consideration on 26 November 1985 in the Second Standing Committee on Statutory Instruments of the House of Commons of the draft Merchant Shipping (Prevention of Oil Pollution) (Amendment) Order 1985, the Parliamentary Under-Secretary of State, Department of Transport, Mr David Mitchell, stated:

The amendments to the annex of the protocol of 1978, relating to the International Convention for the Prevention of Pollution from Ships 1973, known as MARPOL 73/78, were adopted by the Marine Environment Protection Committee of the International Maritime Organisation by Resolution MEPC 14(20)

at its 20th session on 7 September 1984. The amendments, which relate to the prevention of pollution by oil, enter into force on 7 January 1986. The order will enable regulations to be made to apply the amendments to United Kingdom vessels and to non-United Kingdom ships while they are in the United Kingdom or our territorial waters. The regulations will amend the Merchant Shipping (Prevention of Oil Pollution) regulations 1983, which gave effect to annex I of MARPOL 73/78 and came into force on 2 October 1983.

The amendments mark yet a further advance in steps being taken by the International Maritime Organisation to achieve the complete elimination of the discharge of oily mixtures and the minimisation of accidental discharge of oil. In broad terms, they make provision for improvements in ship construction, pollution prevention equipment and operational procedures. The Committee may not expect me to go into great detail about the overall coverage of MARPOL 73/78 beyond saying that it is fundamental to the protection of the marine environment against pollution by discharges from ships. The United Kingdom, as a leading maritime Administration, takes a prominent part in the activities of the International Maritime Organisation which is, in effect, the parent body for the Convention and has been responsible for initiating certain of the amendments.

The powers for making the order are contained in section 20 of the Merchant Shipping Act 1979. In particular, section 20(1)(d) empowers the Secretary of State for Transport to give effect to any international agreement ratified by the United Kingdom so far as the agreement 'relates to the prevention, reduction or control of pollution of the sea or other waters by matter from ships'. Section 20(6) requires the order to be laid under affirmative procedure.

I trust that my remarks will have conveyed that the making of this instrument is in the interests of reducing marine environmental pollution and is in keeping with the United Kingdom's international obligations. The requirements are necessary and are in continuance of our policy in this field. I therefore recommend them to the Committee.

(HC Second Standing Committee on Statutory Instruments, 26 November 1985)

Part Ten: II. A. 2. *Air space, outer space—air navigation—civil aviation—treaty regime*

On 25 October 1986, the Department of Transport issued the following statement:

The British Government are seriously concerned at the Syrian Government's action in denying British civil aircraft permission to overfly Syrian air space without any notice. This is a flagrant breach of our rights under the UK/Syria Air Services Agreement of January 1954 which has the status of a treaty. The British Government look to the Syrian Government to consider carefully the implications of their action and to honour their treaty obligations in accordance with international law.

Part Ten: II. B. *Air space, outer space—air navigation—military aviation*

In reply to the question

Whether the United States President has given an undertaking to the British

Government, parallel to that which he has given to the Italian Government, that United States bases in this country will be used only for NATO purposes, the Minister of State for Defence Support wrote:

Arrangements for the control of American forces based in the United Kingdom were first agreed by Mr Attlee and President Truman in 1951. That agreement was endorsed by Mr Churchill and President Truman in further discussions in 1952. The understanding reached was summarised in a joint communiqué, the relevant section of which reads:

‘Under arrangements made for the common defence, the United States has the use of certain bases in the United Kingdom. We reaffirm the understanding that the use of these bases in an emergency would be a matter for joint decision by Her Majesty’s Government and the United States Government in the light of the circumstances prevailing at the time.’

Any arrangements concerning the use by US forces of bases in Italy would be a matter for the Governments of those countries.

(HL Debs., vol. 469, col. 646: 16 December 1985; see also HC Debs., vol. 96; Written Answers, cols. 224–5: 24 April 1986)

In reply to a question, the Prime Minister wrote:

Under the Churchill–Truman arrangements, there are no circumstances in which American aircraft based in this country may be used without our consent in military operations planned by the United States.

(Ibid., vol. 97, Written Answers, col. 130: 7 May 1986)

Part Ten: V. *Air space, outer space—freedom of navigation*

(See also Part Nine: VII. A. I, above and Part Eleven: II. A. I., below)

In reply to a question on the subject of the interception by Israel of a Libyan civil aircraft, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

I have issued a statement today condemning that action. There was no evidence of terrorists on board the aircraft or of any threat to Israel’s security. In our view, the interception was without justification. I agree with my hon. Friend that it is a dangerous precedent, which appears to have been in contravention of international law. Such acts can only endanger the lives of innocent people.

(Ibid., vol. 91, col. 269: 5 February 1986)

In reply to a further question asking whether his statement also applied to the recent interception of an Egyptian civil aircraft by US military planes, the Secretary of State said:

... there is a distinction between the two cases to which he referred. In relation to the action against the Egyptian jet, it was relevant to take account of the international conventions on hijacking and hostage-taking, which make it

clear that people of the sort involved should be brought to face justice by trial, prosecution or extradition. There is a difference.

(Ibid., col. 270)

In the course of a speech in the UN Security Council on 6 February 1986, the Permanent Representative of the UK, Sir John Thompson, stated:

We condemn the forcible diversion by Israel on 4 February of a private aircraft flying through international air space on a legitimate journey. There was no evidence that it constituted a threat to Israeli security. The interception was without justification. It sets a dangerous precedent apparently in contravention of international law.

(S/PV. 2655, p. 118)

Part Eleven: II. A. 1. Responsibility—responsible entities—States—elements of responsibility

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We condemn the destruction of any aircraft in commercial use and consider that the use of armed force against civil aviation is incompatible with the norms governing international behaviour. We fully supported Security Council resolution 582, which was unanimously adopted on 24 February, and which deplored attacks on civilian aircraft. At present no British aircraft fly into Iran. British passengers on other airlines who make inquiries are advised of the current threat to Iranian airspace.

(HC Debs., vol. 94, Written Answers, cols. 260–1: 20 March 1986)

In reply to a question on the subject of losses to British agriculture caused by the Chernobyl reactor accident, the Minister of State, Foreign and Commonwealth Office, wrote:

We are studying the question of a possible claim by Her Majesty's Government on their own behalf or on behalf of their nationals. We intend in any case to reserve all our rights in this matter with the Soviet Government.

(Ibid., vol. 100, Written Answers, col. 471: 1 July 1986)

In a further reply, the Minister wrote:

On 10 July we formally reserved our right with the Soviet Government to claim compensation on our own behalf and on behalf of our citizens for any losses suffered as a consequence of the accident at Chernobyl. The presentation of a formal claim, should we decide to make one, would not take place until the nature and full extent of any damage suffered had been assessed.

(Ibid., vol. 102, Written Answers, col. 5: 21 July 1986)

In the course of a speech on 11 November 1986 to the Sixth Committee of the UN General Assembly considering the report of the International Law Commission, the UK representative, Sir John Freeland, turned to

the part of the report which dealt with international liability for injurious consequences arising out of acts not prohibited by international law. He observed:

My delegation would, however, support the views of those members of the Commission who have opposed restricting the scope of the articles to ultra-hazardous activities. There would be great difficulty in agreeing on criteria for deciding which activities should be regarded as falling within that category. Some processes—for example, the manufacture of asbestos—only became known to be ultra-hazardous many years after their inception. There is also the difficult question whether a State should be held liable for an activity which it did not know, and could not have known, was likely to cause harm. This is an area where a comparative study of relevant national laws may be particularly helpful. There has been in recent years a growing tendency to adopt absolute liability and no-fault principles. This may suggest that even when a State could not have known that harm might be caused, and accordingly could not have taken preventive action, it should at least share with the State affected, on an agreed or equitable basis, the costs of reparation, given that the nationals of *both* States (those who cause the injury and those harmed) are innocent.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/41/SR. 39, p. 5)

In a speech on 21 November 1986 in the Sixth Committee of the UN General Assembly on the subject of the development and strengthening of good-neighbourliness between States, the UK representative, Mr D. M. Edwards, stated on behalf of the twelve Member States of the European Community:

... while the Twelve recognize that the concept of good-neighbourliness can imply respect for and implementation of important principles and rules of international law, which are already well established, they continue to question whether the notion itself corresponds to any separate principle of international law. They believe that there would be little practical use in continuing attempts to identify a concept that could somehow be considered as the basis for a new legal principle when we already have all the laws we need.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/41/SR. 50, p. 9)

Part Eleven: II. A. 6. *Responsibility—responsible entities—States—reparation*

(See also Part Eleven: II. A. 1. (item of 11 November 1986), above)

Article 16 of the Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link, signed by the UK and France on 12 February 1986, reads:

In the event of either State unilaterally interrupting or terminating the construction or operation of the Fixed Link by the Concessionaires during the term of the Concession, the other State shall be entitled to compensation. Such

compensation shall be limited to the actual and direct loss suffered by that other State and shall exclude any indirect loss or damage; in particular it shall exclude any loss of taxation or other benefits derived from the establishment or operation of the Fixed Link. No compensation shall be payable in respect of an interruption or termination of the construction or operation of the Fixed Link on grounds of national defence where it serves the defence interests of both States.

(Cmnd. 9745)

In reply to a question on the subject of an agreement with the Maltese Government over the clearance of wartime wreckage from Grand Harbour, Valletta, the Minister of State, Foreign and Commonwealth Office, wrote:

We have agreed to pay costs amounting to approximately £1.7 million for the removal of wartime wreckage in Grand Harbour, Valletta. In addition, the Ministry of Defence waived the costs of the Royal Navy diving detachment which working in close co-operation with the Maltese authorities and contractors provided specialised assistance. We welcome the satisfactory resolution of this problem.

(HC Debs., vol. 92, Written Answers, col. 283: 20 February 1986; see also UKMIL 1981, p. 495)

On 15 May 1986, the Governments of the UK and China concluded an Agreement concerning the Promotion and Reciprocal Protection of Investments. The following articles are contained in the Agreement:

ARTICLE 4

Compensation for Losses

(1) Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment no less favourable than that which the latter Contracting Party accords to nationals or companies of any third State.

(2) Without prejudice to paragraph (1) of this Article, nationals or companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from

- (a) requisitioning of their property by its forces or authorities, or
- (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded restitution or reasonable compensation. Resulting payments shall be freely transferable.

ARTICLE 5

Expropriation

(1) Investments of nationals or companies of either Contracting Party shall not be expropriated, nationalised or subjected to measures having effect equivalent to expropriation or nationalisation (hereinafter referred to as 'expropriation') in the

territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party and against reasonable compensation. Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall include interest at a normal rate until the date of payment, shall be made without undue delay, be effectively realisable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee reasonable compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.

ARTICLE 6

Repatriation of Investment and Returns

(1) Each Contracting Party guarantees to nationals or companies of the other Contracting Party the right to transfer freely to the country where they reside their investments and returns and any payments made pursuant to a loan agreement in connection with any investment.

(2) The right referred to in paragraph (1) above is subject to the right of each Contracting Party in exceptional balance of payments difficulties and for a limited period to exercise equitably and in good faith powers conferred by its laws. Such powers shall not however be used to impede the transfer of profit, interest, dividends, royalties or fees; as regards investments and any other form of return, transfer of a minimum of 20 per cent a year is guaranteed.

(3) Transfers of currency shall be effected without delay in the convertible currency in which the capital was originally invested or another convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the national or company concerned, transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange control regulations in force of the Contracting Party concerned.

(4) In respect of the People's Republic of China, transfers of convertible currency by a national or company of the United Kingdom under paragraphs (1) to (3) above shall be made from the foreign exchange account of the national or company transferring the currency. Where that foreign exchange account does not have sufficient foreign exchange for the transfer, the People's Republic of China shall permit the conversion of local currency into convertible currency for transfer, in the following cases:

- (a) proceeds resulting from the total or partial liquidation of an investment;
- (b) royalties derived from assets in Article 1 (1)(a)(iv);
- (c) payments made pursuant to a loan agreement in connection with any investment guaranteed by the Bank of China . . .

(TS No. 33 (1986); Cmnd. 9821. See also the agreements on the same subject signed on 20 May 1986 by the Governments of the UK and Mauritius (Cmnd. 9822) and concluded on 4 October 1986 between the Governments of the UK and Malta (TS No. 62 (1986); Cm. 20). Note the differences in Articles 5 between 'reasonable compensation' (China) and 'prompt, adequate and effective compensation' (Mauritius and Malta); 'real value of the investment' (China) and 'market value of the investment' (Mauritius and Malta); 'normal rate' (China) and 'normal commercial rate' (Mauritius and Malta).)

In the course of a debate in the House of Lords on the subject of the judgment of the European Court of Human Rights in the shipbuilding nationalization case (*Lithgow and others*), the Parliamentary Under-Secretary of State, Department of Trade and Industry, Lord Lucas of Chilworth, stated:

The House will recall that the *Lithgow* case arose from seven applications lodged with the European Commission of Human Rights. The principal complaint was that the Aircraft and Shipbuilding Industries Act 1977 did not fulfil the Government's obligations under Article 1 of the First Protocol to the European Convention on Human Rights. The relevant part of that article . . . reads,

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

It is important to recall that the issue before the European Court of Human Rights was whether the 1977 Act was so open to objection as to show that the United Kingdom acted outside the margin of appreciation which the convention leaves with member states. As the House knows, the court found in the Government's favour by a large majority, as the commission had done before.

The court decided that the general principles of international law of prompt, adequate and effective compensation do not apply to the taking by a state of the property of its own nationals. In doing so, it reaffirmed the position in its judgment in the case of *James and others*, more commonly known as the *Duke of Westminster's* case.

I should recall in this regard that it was common ground between the Government and the applicants that the general principles of international law stipulate that a state may only take the property of a foreigner if the taking is for a public purpose, is not discriminatory and is accompanied by adequate, prompt and effective compensation. This has been the consistent position of British Governments, and it remains the position today. It is simply not true to suggest that the court's judgment constitutes any precedent for the expropriation of British assets abroad.

The European Court further held, again consistent with the previous case law, that the taking of property without payment of compensation of an amount reasonably related to the value of the property would normally constitute a disproportionate interference which could not be considered justifiable under Article 1.

(HL Debs., vol. 481, cols. 1218-19; 6 November 1986)

Part Eleven: II. A. 7. (a). *Responsibility—responsible entities—States—procedure—diplomatic and consular protection*

(See also Part Three: I. A. 2 (item of 16 June 1986), above)

In reply to the question whether Her Majesty's Government will make representations to the French Government regarding the level of fines on British lorry drivers in respect of deliveries, including lamb, from Britain to France, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We are ready to intervene, as we have on several occasions in the past, on behalf of British nationals in cases where there is clear evidence of unfair penalties being levied by overseas authorities.

(HC Debs., vol. 94, Written Answers, col. 259: 20 March 1986)

In reply to a question on the subject of persons detained in Zimbabwe, the Minister of State, Foreign and Commonwealth Office, wrote in part:

Mr Evans was until recently a Zimbabwean citizen also, and therefore we had no consular standing in his case, but as he has now allowed his citizenship to lapse, he has been regularly visited by the High Commission staff.

(HL Debs., vol. 477, col. 1025: 3 July 1986)

At a press conference held on 8 December 1986, a spokesman for the Foreign and Commonwealth Office stated that the British Consul in Tehran had been able to see Mr Roger Cooper, a British subject detained there, but that they had not been able to speak to each other. The spokesman stressed that this did not constitute consular access.

At a subsequent press conference, held on 15 December 1986, the spokesman stated in respect of the same matter that Iran had 'clear obligations under the Vienna Convention on Consular Relations and the International Covenant on Civil and Political Rights'.

(Information provided by the Foreign and Commonwealth Office)

Part Eleven: II. A. 7. (a). (i). *Responsibility—responsible entities—States—procedure—diplomatic and consular protection—nationality of claims*

(See also Part Three: I. A. 2. (item of 16 June 1986), and Part Eleven: II. A. 7. (a). (item of 3 July 1986), above)

On 15 May 1986, the Governments of the UK and China concluded an Agreement concerning the Promotion and Reciprocal Protection of Investments. Article 1 of the Agreement reads in part as follows:

...

(c) 'nationals' means:

- (i) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom and having the right of abode in the United Kingdom or

in any territory to which this Agreement has been extended in accordance with the provisions of Article 10;

- (ii) in respect of the People's Republic of China: physical persons who have nationality of the People's Republic of China in accordance with its laws;

(d) 'companies' means:

- (i) in respect of the United Kingdom: corporations, firms or associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement has been extended in accordance with the provisions of Article 10;
- (ii) in respect of the People's Republic of China: corporations, firms or associations incorporated or constituted under the law in force in any part of the People's Republic of China.

(TS No. 33 (1986); Cmnd. 9821. See also Agreement of 20 May 1986 signed by the Governments of the UK and Mauritius (Cmnd. 9822) and Agreement concluded on 4 October 1986 between the Governments of the UK and Malta (TS No. 62 (1986); Cm. 20))

Part Eleven: II. A. 7. (b). *Responsibility—responsible entities—procedure—peaceful settlement*

On 15 July 1986, the Governments of the UK and the Soviet Union concluded an Agreement concerning the Settlement of Mutual Financial and Property Claims arising before 1939 (TS No. 65 (1986); Cm. 30). The following Explanatory Memorandum was issued at the time:

This Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics contains a final settlement of mutual financial and property claims arising before 1939. Negotiations on British claims and Soviet counter-claims began in 1922. The final stage of the talks began in 1977.

The Agreement was signed today by Sir Geoffrey Howe and Mr Eduard Shevardnadze. It comes into force immediately.

The Agreement provides for a mutual waiver of claims by both Governments and sets out in detail the claims which are covered. It also provides that each Government shall have full title to the assets remaining in its territory under the terms of the Agreement and be solely responsible for settling claims of its own nationals. Finally, it provides for the release to the Soviet Government of a sum of money in diplomatic and certain miscellaneous official bank accounts held in London. These were Embassy and diplomatic accounts which enjoy a specially protected status under international law.

The following Background Note was also issued:

The Claims Agreement signed today by Sir Geoffrey Howe and Mr Shevardnadze provides for a mutual waiver of claims.

The claims in question go back to the Bolshevik Revolution in November 1917. Shortly thereafter the Soviet Government repudiated all the financial obligations of their predecessors and expropriated land and other kinds of property. This resulted in considerable losses to the British Government and our nationals. The British Government had claims of the order of £500 million in

respect of Russian war debt. British companies and British subjects were invited to register their claims with the Foreign Claims Department of the Foreign Office as long ago as September 1918. That work was shortly thereafter transferred to the Russian Claims Department of the Board of Trade and continued until that Department was wound up in the early 1950s. By that time around 37,000 British claimants had registered a total of some 60,000 private claims valued at £400 million.

The files relating to these British private claims have been carefully preserved. They are kept in the Public Record Office.

For its part the Soviet Government made large counter-claims against the British Government in respect of losses caused during the British involvement in the intervention in Soviet Russia between 1918 and 1921. Their claim was for £2,000 million but we disputed the calculation of this claim strongly during the negotiations.

Many attempts were made by successive Administrations over the years to secure a settlement of these claims. The very first Agreement reached between Her Majesty's Government and the Soviet Government was a Trade Agreement on 16 March 1921 during Mr Lloyd-George's Premiership which contained, in addition to provisions regarding the resumption of trade, a Declaration of recognition of claims by both Governments and their nationals in respect of property and other obligations incurred by either Government. Allied claims against Russia were also discussed at the Genoa Conference in 1922 but no agreement was reached then. For their part the Russians tabled two counter proposals, one of which would have involved Allied acceptance of Russian claims for damages caused by their military forces in Russia during the period of intervention. A further Conference at The Hague in June 1922 was no more successful.

Bilateral negotiations with the Soviet authorities took place in 1924 during the Administration led by Mr Ramsay Macdonald. An Agreement was signed on 8 August 1924 providing a framework in which claims could be settled. That framework included a formula for leaving aside both the Russian intervention claim and Her Majesty's Government's war debt claim for later settlement. Mr Ramsay Macdonald's Administration also agreed to provide credits to the Soviet Government, although this was dependent upon the Russians making progress on settling the claims. However, when Mr Baldwin became Prime Minister his Administration informed the Soviet Government that they would not ratify that Agreement.

Detailed negotiations on claims took place in 1930 and 1931 when a mixed Anglo-Soviet Commission was established for this purpose but they were discontinued in January 1932 when the Soviet Government reiterated that it had never accepted any legal responsibility for obligations which it had not itself contracted and also stood by the 1918 Decrees annulling pre-Revolutionary debts and nationalising property.

Further discussion took place in Moscow in March 1939 during a visit by Mr Hudson, the then Secretary of the Department of Overseas Trade, who had informal exchanges with the Soviet Foreign Minister, Mr Litvinov. It was not possible to carry these exchanges further prior to the outbreak of the Second World War and it was not until July 1955 that the question of claims was again raised with Soviet Government. No substantive progress was made at that time

and the negotiations in the pre-1939 claims did not enter their final phase until 1977 during the Administration led by the Rt. Hon. James Callaghan MP, when the British side put forward a draft Agreement. Wide-ranging and detailed discussions of the claims and counter-claims took place for nine years on the basis of this draft. On 16 June 1986, the text of the present Agreement was initialled by Heads of Delegation and following approval by the two Governments was signed today.

The Agreement provides for the waiver of claims by both Governments and describes the various claims. It also provides that each Government shall have full title to the assets remaining in its territory under the terms of the Agreement and be solely responsible for settling claims of its nationals. Finally, it provides for the release to the Soviet Government of a sum of money in diplomatic and other miscellaneous official accounts held in London by or on behalf of the former Russian Embassy here, or by individual diplomats and officials. These were essentially diplomatic accounts which enjoy a special status under international law.

The monies in banks in the United Kingdom which will become available for distribution to British claimants under the terms of the Agreement exceed £45 million. The Government has waived its entitlement to a share of this money in respect of its own claims. All the money will be distributed to the original private British claimants, both corporate and individual, and to their heirs and successors as well as to the British holders of bonds issued or guaranteed by the Russian Government prior to 7 November 1917 who acquired these bonds on or before Monday, 14 July 1986.

An Order in Council will shortly be made and laid before Parliament providing for the distribution of this Fund. The Government intends the distribution to be as rapid as possible and hopes it may be completed in its entirety within three years. The Government has decided that, apart from British bond holders, the distribution will be limited to the original British claims which were registered over a period of more than 30 years.

A cut-off date of Monday, 14 July 1986, has been set on which bond holders must show that they held British nationality. This has been done in order to avoid transfer of the bonds from foreign to British hands. The Stock Exchange therefore suspended all dealings in these Russian bonds at the start of their normal operations today. British bond holders who wish to share in this distribution will be required to make a formal statutory declaration that they had acquired the bonds on or before Monday, 14 July 1986.

The Government has it in mind to set a closing date of 31 December 1986 for the presentation of bonds by British bond holders. Other applicants will be given a somewhat longer period in which to apply to share in the distribution but the closing date for such applications will not be later than the middle of 1987. Given the antiquity of these claims it is particularly important to ensure that distribution takes place as swiftly as is possible.

(Texts provided by the Foreign and Commonwealth Office)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The negotiations with the Soviet Union which began over 60 years ago about pre-1939 British financial and property claims and Soviet claims in respect of

British involvement in the intervention in Russia from 1918 to 1921 have been brought to a successful conclusion. The Soviet Foreign Minister and my right honourable and learned friend signed an agreement on the subject this morning. It sets the seal upon many attempts made by successive Administrations over the years to secure a settlement of these claims. Copies of the agreement have, earlier today, been laid and placed in the Library and Printed Paper Office of the House.

The agreement sets out in detail the provisions for a mutual waiver of claims by both Governments. It also provides that each Government shall have full title to the assets remaining in its territory under the terms of the agreement and be solely responsible for settling claims of its own nationals. Finally, it provides for the release to the Soviet Government of a sum of money amounting to £2.65 million in diplomatic and certain miscellaneous official bank accounts held in London. These were essentially embassy and diplomatic accounts which enjoy a special status under international law.

We understand that the remaining moneys in banks in the United Kingdom which will become available for distribution to British claimants under the terms of the agreement exceed £45 million. The Government have waived their entitlement to a share of this money in respect of their own claims and it will be distributed to the original private British claimants, both corporate and individual, and to their heirs and successors as well as to the British holders of bonds issued or guaranteed by the Russian Government prior to 7th November 1917 who acquired these bonds on or before Monday, 14th July 1986.

An Order in Council will be made and laid before Parliament in due course providing for the distribution of this fund. We intend the distribution to be as rapid as possible. We hope it may be completed in its entirety within three years. We have decided that, apart from British bond holders the distribution will be limited to the original British claims. These original claims were registered over a period of more than 30 years.

A cut-off date of Monday, 14th July has been set for British bond holders. This has been done in order to avoid speculation in the bonds or their transfer from foreign to British hands. The Stock Exchange therefore suspended all dealings in these Russian bonds at the start of their normal operations today. British bond holders who wish to share in this distribution will be required to make a formal statutory declaration that they had acquired the bonds on or before Monday, 14th July. We have it in mind, subject to the approval of the House, to set a closing date of 31st December 1986 for the presentation of bonds by British bond holders. We propose to allow other applicants a somewhat longer period in which to apply to share in the distribution but the closing date for such applications will not be later than the middle of 1987.

(HL Debs., vol. 478, cols., 895-6: 15 July 1986; see also HC Debs., vol. 101, Written Answers, cols. 439-40: 15 July 1986)

In reply to the question what progress has been made in negotiations between the British and Chinese Governments over settlement of capital and income from bonds issued by the Chinese Government before 1948, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

A first round of claims negotiations was held in Peking from 5 to 10 May 1986. They took place in a friendly and frank atmosphere. We are currently discussing with the Chinese authorities the dates and venue for a second round of talks.

(HC Debs., vol. 101, Written Answers, col. 649: 18 July 1986)

Part Eleven: II. D. 2. *Responsibility—responsible entities—individuals, including corporations—responsibility of individuals*

In the course of a speech in explanation of a vote on the subject of mercenaries, the UK representative to the Sixth Committee of the UN General Assembly, Mr D. M. Edwards, on behalf of the twelve Member States of the European Community, stated on 18 November 1986:

. . . the Twelve wish to repeat the view expressed on previous occasions concerning the sixth preambular paragraph of the Resolution which states that the activities of mercenaries are contrary to the fundamental principles of international law. Of course, mercenary activities may be contrary to international law when, for example, they involve interference in the internal affairs of a State at the instigation or with the assistance of another State. In other cases, however, while the crimes or offences of individuals acting on their own behalf are clearly reprehensible, the Twelve do not accept that such activities can be imputed to States or regarded as violations of international law.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/41/SR. 47, p. 8)

Part Twelve: II. B. *Pacific settlement of disputes—modes of settlement—consultation*

Article 18 of the Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link, signed by the UK and France on 12 February 1986, reads as follows:

Consultation between Governments

The two Governments shall consult, at the request of either:

- (a) on any matter relating to the interpretation or the implementation of this Treaty or the Concession;
- (b) on the consequences of any measures announced or taken which could substantially affect the construction or the operation of the Fixed Link;
- (c) on any action proposed in relation to any rights or obligations of the States under the Treaty or the Concession;
- (d) upon the termination of the Concession for any reason, on the future use of the Fixed Link, its continued development and its continued operation.

(Cmnd. 9745)

Part Twelve: II. G. *Pacific settlement of disputes—modes of settlement—arbitration*

In the course of a speech on 11 November 1986 to the Sixth Committee of the UN General Assembly discussing the report of the Inter-

national Law Commission, the UK representative, Sir John Freeland, stated:

I now wish to refer to the important topic of *State responsibility*. This year's session of the Commission had before it the Special Rapporteur's detailed proposals for the content of Part Three of the draft articles. These provide, essentially, for the peaceful settlement of disputes and, where necessary, for them to be resolved by compulsory jurisdiction of the International Court of Justice or by compulsory conciliation. As members of this Committee will know well, the United Kingdom is traditionally very much in favour of the establishment of formal and workable machinery for settlement of disputes, preferably by arbitral or judicial means. Although we have certain reservations regarding the latest draft articles, we therefore support their basic thrust.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/41/SR. 39, pp. 3-6)

Part Twelve: II. G. 1. *Pacific settlement of disputes—modes of settlement—arbitration—arbitral tribunals and commissions*

Article 8 of the Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link, signed by the UK and France on 12 February 1986, reads as follows:

Arbitration

- (1) An arbitral tribunal shall be constituted to settle:
 - (a) disputes between the two States relating to the interpretation or application of this Treaty which are not settled through consultations under Article 18 within three months;
 - (b) disputes between the Governments and the Concessionaires relating to the Concession;
 - (c) disputes between the Concessionaires relating to the interpretation or application of this Treaty.
- (2) The arbitral tribunal shall be constituted for each case in the following manner:
 - (a) Within two months of the receipt of the request for arbitration each Government shall appoint one arbitrator.
 - (b) The two arbitrators shall, within a period of two months of the appointment of the second, appoint, by mutual agreement, a national of a third State as third arbitrator, who shall act as chairman of the tribunal.
 - (c) If within the time limits specified above any appointment has not been made, a party may, in the absence of any other agreement, request the President of the Court of Justice of the European Communities to make any necessary appointment.
 - (d) If the President of that Court is a national of either State, or if he is otherwise unable to act, the Presidents of the Chambers of the Court in order of seniority shall be requested to make the appointment.
 - (e) If the latter are nationals of one of the States or are likewise unable to act, the member of the Court next in seniority who is not a national of either

State or otherwise unable to act shall be requested to make the appointment.

- (f) In any case to which the Concessionaires are parties they shall be entitled to appoint two additional arbitrators. The two arbitrators appointed by the Governments shall appoint the chairman of the tribunal by agreement with the two arbitrators appointed by the Concessionaires. In default of agreement within the time limit specified in sub-paragraph (b), the chairman shall be appointed in accordance with the procedure prescribed in sub-paragraphs (c), (d) and (e) of this paragraph. The arbitrators appointed by the Concessionaires shall not participate in that part of any decision relating to the interpretation or application of the Treaty.

(3) The arbitral tribunal shall take decisions by a majority vote. No arbitrator may abstain. In the event of the votes being equally divided the chairman shall have a casting vote. The tribunal may, at the request of one of the parties, interpret its own decisions. Decisions of the tribunal shall be final and binding on the parties.

(4) Each party shall bear the costs of the arbitrator appointed by it, or appointed on its behalf, and an equal share of the costs of the chairman; the other costs of the arbitration process shall be borne in a manner determined by the tribunal.

(5) In order to resolve any disputes regarding the Treaty, the tribunal shall have regard to the Treaty and the relevant principles of international law.

(6) In order to resolve any disputes regarding the Concession, the relevant provisions of the Treaty and the Concession shall be applied. The rules of English law or the rules of French law may, as appropriate, be applied when recourse to these rules is necessary for the implementation of particular obligations under English law or French law. In general recourse may also be had to the relevant principles of international law, and if the parties in dispute agree, to principles of equity.

(Cmnd. 9745)

Article 8 of the Agreement concerning the Promotion and Reciprocal Protection of Investments, concluded by the UK and China on 15 May 1986, reads as follows:

Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, as far as possible, be settled through the diplomatic channel.

(2) If a dispute between the Contracting Parties cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal shall determine its own procedure.

(TS No. 33 (1986); Cmnd. 9821. See also the agreements on the same subject signed on 20 May 1986 by the Governments of the UK and Mauritius (Cmnd. 9822) and concluded on 4 October 1986 by the Governments of the UK and Malta (TS No. 62 (1986); Cm. 20))

Part Twelve: II. H. *Pacific settlement of disputes—modes of settlement—judicial settlement*

(See Part Twelve: II. G., above)

Part Twelve: II. H. 1. *Pacific settlement of disputes—modes of settlement—judicial settlement—the International Court of Justice*

(See also Part Eight: II. D. (item of 3 July 1985), above)

In the course of a debate in the UN Security Council on 31 July 1986 on the subject of US activity in Nicaragua, the UK representative, Sir John Thomson, stated:

I recognize that we are the only permanent member of the Security Council to accept the compulsory jurisdiction of the Court. This is a pity. Naturally, it would in our view be right that all Members of the Organization should accept the compulsory jurisdiction of the Court. I hope that we can work towards that outcome. We would have liked the draft resolution before us to stress this point, though it would, of course, be opposed by some delegations. Nevertheless, it remains my delegation's position that others should adopt and act on the same obligations as we have adopted and acted upon.

. . . Of course, as the one permanent member of the Security Council that accepts the compulsory jurisdiction of the International Court of Justice, we would have had no quarrel about a resolution taking note of the Court's Judgment. At the same time, we are still considering the International Court of Justice's Judgment, which relates to many complex legal issues of a general nature. We attach primary importance to upholding the rule of law in international relations. We believe that over the years the International Court of

Justice has played a valuable role in resolving international disputes and in clarifying the rights and obligations of States under the law. We have invariably accepted the Judgments of the International Court of Justice in cases to which the United Kingdom was a party.

(S/PV. 2704, pp. 47-52, *passim*; see also S/PV. 2718, p. 52)

Part Twelve: II. I. 1. *Pacific settlement of disputes—modes of settlement—settlement within international organizations—the United Nations*

In the course of a speech on 10 October 1986 to the Sixth Committee of the UN General Assembly, the UK representative, Mr D. M. Edwards, stated:

His delegation could not agree to the preparation of a new normative instrument on the non-use of force. The Charter of the United Nations contained a comprehensive code on the pacific settlement of disputes. All the relevant provisions formed part of a complete whole which was carefully balanced and should not be disturbed.

(A/C. 6/41/SR. 14, p. 14)

Part Thirteen: I. A. *Coercion and use of force short of war—unilateral acts—retorsion*

(See Part Thirteen: I. E. (item of 11 March 1986), below)

Part Thirteen: I. D. *Coercion and use of force short of war—unilateral acts—intervention*

(See also Part Eleven: II. D. 2., above)

In July 1984, the Planning Staff of the Foreign and Commonwealth Office produced for internal use a document entitled 'Is intervention ever justified?' This document was released to the public in 1986 as Foreign Policy Document No. 148. Its paragraph I. 3 reads as follows:

For the purposes of this paper, intervention will usually be taken to mean dictatorial interference in affairs normally within the domestic jurisdiction of a state. Although this broad definition allows for intervention by means other than armed force (such as economic coercion or propaganda), armed force or the threat thereof is involved in most of the cases considered in the paper.

Part II of the document reads as follows:

Intervention in International Law

'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.

Article 2(4) of the UN Charter

'Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any

state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'.

Article 2(7) of the UN Charter

II.1. All contemporary international lawyers agree that intervention is, as a general rule, forbidden by international law. Since 1758, when Vattel set out the duty of non-intervention as a restatement of the right to independence from the negative side, this principle has been seen as the corollary of every state's right to sovereignty, territorial integrity and political independence. Articles 2(4) and (7) of the UN Charter, quoted above, make this clear. The Charters of the OAS, the OAU and the Arab League all embody the principle of non-intervention.

II.2. The prohibition of intervention implicit in the UN Charter has been made explicit in numerous drafts put before, and several Resolutions approved by, the General Assembly, which, although not binding, may be considered to reflect customary international law. Of these, the most important are the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States (adopted with 109 in favour, none against, and only the UK abstaining);² the 1970 Declaration on Principles of International Law concerning Friendly Relations . . . among States (adopted without vote); and the 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (adopted with 120 in favour, 22 (including the UK, EC and US) against,³ and 6 abstentions). All three Declarations affirm that no state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference are condemned; no state may use economic, political or any other measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights or advantages of any kind.

II.3. The Helsinki Final Act is one of a number of regional arrangements specifically to forbid intervention in the internal affairs of participating states. Principle VI of that Act (on Non-Intervention in Internal Affairs) includes an undertaking by states to refrain from 'political, economic or other coercion . . . to subordinate to their own interest the exercise by another participating State of the rights [of] sovereignty'. An early precedent for such an undertaking was the inclusion of 'non-interference in internal affairs' as one of the *pancha sila*, or five principles, set out in the preamble to the China-India Treaty of 1954. These principles came to form part of the basic creed of the Non-Aligned Movement.

II.4. In all these international arrangements, intervention is regarded as including political and economic measures. However, in international law intervention is usually defined as forcible or dictatorial interference by a state in the affairs of another state, calculated to deprive that state of control of the matter in question. States perform many acts which affect other states but which are solely within their own sovereign rights or are not dictatorial, and therefore do not violate the sovereign rights of other states.

II.5. The exceptions to the general prohibition on intervention are strictly limited in international law, and may be said to fall into five broad categories.

(a) *Intervention under a treaty with, or at the invitation of, another state*

II. 6. If one state requests assistance from another, then clearly that intervention cannot be dictatorial and therefore unlawful. In 1976 the Security Council recalled, in a preamble to a Resolution, that it is 'the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States'.⁶ Examples of such lawful intervention at the request of states might be British aid to Muscat and Oman in 1957 at the request of the Sultan; the US/Belgian action to rescue the hostages in Stanleyville in 1964; or the action taken by the Federal Republic of Germany with the consent of the Somali authorities to free a hi-jacked aircraft at Mogadishu Airport in 1977.

II.7. International law does, however, place two major restrictions on the lawfulness of states providing outside assistance to other states. One is that any form of interference or assistance is prohibited (except possibly of a humanitarian kind⁷) when a civil war is taking place and control of the state's territory is divided between warring parties. But it is widely accepted that outside interference in favour of one party to the struggle permits counter-intervention on behalf of the other, as happened in the Spanish Civil War and, more recently, in Angola.

II.8. Some commentators also believe that a second limitation is on other states' acceding to requests from a 'colonial power' for assistance in suppressing an armed struggle by peoples of a colony seeking to exercise their right of self-determination. Article 1 of the two Human Rights Covenants coming into force in 1976 is relevant here. This view is not, however, shared by many international lawyers, and might be problematic for countries such as France or the United Kingdom.

II.9. Intervention under a treaty by which one state consents to intervention in certain circumstances by another is of course only apparent intervention—provided that the intervening state remains within the terms of the treaty.⁸

(b) *Intervention with the authority of the Security Council (or, less certainly, the General Assembly); or other collective intervention on behalf of international bodies*

II.10. Chapter VII of the UN Charter (Articles 39–51) was drawn up to ensure that the Security Council could 'maintain or restore international peace and security' through the use of armed forces, but many of its provisions (for example, Article 42) have never been used. And the failure to conclude military agreements in accordance with Article 43 has rendered that Article unusable. Recommendations have, however, been made under Article 39 suggesting that members make armed forces available, but only in the case of Korea. Articles 52 and 53 are clear that regional organisations' main role is in the peaceful settlement of disputes, and that any enforcement action must be under the authority of the Security Council.

II.11. The only other, and much more uncertain, form of intervention provided for in the UN system is that under the 'Uniting for Peace' Resolution of 1950. The Charter gives the Security Council responsibility for maintaining or restoring 'international peace and security', if necessary by despatching military forces (Chapter VII). If, however, the Security Council could not agree, the General

Assembly 'Uniting for Peace' Resolution was designed by its American sponsors to give the Assembly powers to deal with these issues by, for example, holding an emergency special session of the Assembly to discuss the matter. It is generally accepted today that the Assembly can meet to discuss threats to 'international peace and security' if the Council cannot agree (for example, on Afghanistan in 1980). But it is not now considered to have the power to despatch military forces to deal with such disputes.

II. 12. Some international lawyers also allow other collective action undertaken in the general interest of states or for the collective enforcement of international law. However, this would be difficult to justify in the absence of any of the other grounds for intervention cited in this Section. It should, moreover, be distinguished from limited exceptions such as that in the Inter-American Treaty of Reciprocal Assistance signed at Rio in 1947. This provides for collective measures to be taken, after consultation, in the event of aggression against any American State (Article 6). The OAS Charter 10, signed at Bogota the following year, states that measures for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the articles in the Charter prohibiting intervention.

(c) *Intervention in exercise of the right of individual or collective self-defence*

II.13. Article 51 of the UN Charter states in part that 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'. But this was clearly not intended at the time to cover intervention (or counter-intervention) in circumstances which do not involve an actual or threatened armed attack, still less what some politicians and writers have described as 'preventive' or 'pre-emptive' intervention.

II.14. In one of few judicial comments on intervention, the alleged right of intervention in self-defence was undermined by the judgement against the United Kingdom by the International Court of Justice in the celebrated *Corfu Channel* case of 1949. After two Royal Navy destroyers had been damaged by Albanian mines in the international strait, Britain sought to collect evidence by undertaking a minesweeping operation in Albanian territorial waters. Although the Court found Albania guilty of causing the explosions, it rejected British claims that the intervention was justified on grounds of 'safe-guarding evidence necessary for the purposes of justice', action to prevent an international 'nuisance' and 'self-protection or self-help'. The Court regarded 'the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organisations, find a place in international law'.

(d) *Protective intervention*

II.15. Related to the right of self-defence is a state's alleged right to intervene to protect its citizens or, more controversially, their property abroad. Most writers derive this right from that enshrined in Article 51 of the Charter, and see action to protect nationals abroad as a form of self-defence. Thus the United States claimed that its use of force to rescue United States nationals from Cambodia in 1975, Iran in 1980 and Grenada in 1983 was justified by Article 51.

The landing of Israeli commandos at Entebbe Airport in 1977 and of French and Belgian paratroops in Zaire in 1978 were justified on similar grounds.

II.16. An alternative, and less satisfactory, approach is to seek to derive from customary international law a right of intervention to protect nationals. In either case, it is clear that such intervention must be confined to securing the safety of the nationals, and is open to all sorts of abuse. For this and other reasons, many authors doubt whether a right to intervene on behalf of nationals abroad does exist, believing that force may be used in defence of nationals only when they are present on the territory of the state of which they belong. Judges Morozov and Tarazi supported this view in the 1980 ICJ *Case concerning United States Diplomatic and Consular Staff in Tehran*.

II.17. The alleged right to intervene to protect the property of a state's citizens abroad was brought forward as a justification for the British landings in Egypt in 1956 and for South African intervention in Angola in 1976. It would not generally be accepted as lawful today.

(e) *Humanitarian intervention*

II.18. The final, and by far the most controversial, category of exceptions to the general prohibition on intervention is that on humanitarian grounds. This should be distinguished from action to protect a state's own nationals abroad discussed in (d) above. The vast literature on this subject in the past and present century has wrestled with the difficulty of reconciling a state's supposedly absolute sovereignty with even more fundamental human rights which may be held to justify intervention on behalf of oppressed nationals of another state. Lauterpacht put his finger on the fundamental contradiction in international law, in the UN Charter and in other documents, between state sovereignty and other states' right to comment on, let alone to intervene to protect, human rights: 'in so far as the availability of a remedy is the hallmark of a legal right, they [fundamental human rights] are imperfect legal rights'.¹²

II.19. Those who have argued for a right of humanitarian intervention have done so by appealing to the common interest of humanity and to state practice over the past two centuries.

II.20. Oppenheim, in the first edition of his *International Law* published in 1905, put it thus: '... it cannot be denied that public opinion and that attitude of the Powers are in favour of such interventions, and it may perhaps be said that in time the Law of Nations will recognise the rule that interventions in the interests of humanity are admissible provided they are exercised in the form of a *collective* intervention of the Powers'. Lauterpacht's rationale for humanitarian intervention is that 'ultimately, peace is more endangered by tyrannical contempt for human rights than by attempts to assert, through intervention, the sanctity of human personality'.¹³ A substantial body of opinion and of practice has thus supported the view that when a state commits cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.

II.21. The state practice to which advocates of the right of humanitarian intervention have appealed provides an uncertain basis on which to rest such a right.

Not least this is because history has shown that humanitarian ends are almost always mixed with other less laudable motives for intervening, and because often the 'humanitarian' benefits of an intervention are either not claimed by the intervening state or are only put forward as an *ex post facto* justification of the intervention. In the nineteenth century, interventions by the Western Powers to protect the Christian and other minorities in the Ottoman Empire, such as the Maronites on Mount Lebanon, are those most often said to have been for humanitarian ends. The two most discussed instances of alleged humanitarian intervention since 1945 are the Indian invasion of Bangladesh in 1971 and Tanzania's 'humanitarian' invasion of Uganda in 1979. But, although both did result in unquestionable benefits for, respectively, the peoples of East Bengal and Uganda, India and Tanzania were reluctant to use humanitarian ends to justify their invasion of a neighbour's territory. Both preferred to quote the right to self-defence under Article 51. And in each case the self-interest of the invading state was clearly involved.

II.22. In fact, the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal. To make that case, it is necessary to demonstrate, in particular by reference to Article 1(3) of the UN Charter, which includes the promotion and encouragement of respect for human rights as one of the Purposes of the United Nations, that paragraphs 7 and 4 of Article 2 do not apply in cases of flagrant violations of human rights. But the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons: first, the UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation. As Akehurst argues, 'claims by some states that they are entitled to use force to prevent violations of human rights may make other states reluctant to accept legal obligations concerning human rights'.¹⁵ In essence, therefore, the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law.

* * * * *

II.23. In conclusion, it should be noted that various other exceptions to the rule of non-intervention have from time to time been advanced; but that none of them is now accepted by a significant number of international lawyers. Among these are armed intervention to enforce the provisions of a treaty, to restore the balance of power, to deal with chronic disorder in a neighbouring state, to undertake international police action, or to assist a national liberation movement seeking to assert the right of self-determination. Of these, only the last deserves a fuller mention here. Most Western writers reject such a right on the grounds that such assistance (unless, possibly, it is humanitarian or economic) infringes the sovereignty of the state, at least until the rebels establish belligerent rights by controlling part of the territory. Brownlie¹⁶ gives a good account of the reasons for dismissing the other grounds for intervention.

II.24. This brief account of the extensive legal debate on intervention has

concentrated on the treatment of the subject in conventional and contemporary international law. An alternative approach, favoured in earlier times, might be that of writers of the natural law school who would judge any particular case of intervention in the context of the natural rights of man. But such an approach would today be unlikely to command widespread international support, and would in any case raise as many questions as it would answer. This Section has shown how often the 'legal' debate about intervention strays into politics and morality, the subject of the next Section.

...
² Several countries, including the UK, expressed reservations on the grounds that the Declaration was 'vague and imprecise in language, and more political than legal in content, based more on concepts of international politics than on rigorous juridical analysis' (UN Year Book 1965).

³ Britain and other countries voted against the 1981 Declaration not because they objected to the principles underlying the Resolution, but because they found objectionable certain subsidiary and semi-legal provisions on, for example, the exchange of information and permanent sovereignty over natural resources.

...
⁶ SCR 387, condemning South African aggression against Angola.

⁷ See para. II.18 ff. below.

⁸ For example, under the 1960 Treaty of Guarantee for Cyprus, each of the guarantor states 'reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty' if the Treaty has been breached and common action proves impossible.

...
¹² *International Law and Human Rights*, page 34.

¹³ *International Law and Human Rights*, page 32.

...
¹⁵ In *Intervention and World Order*, ed. Bull. See also Donnelly, *Humanitarian Intervention etc.* and Lillich, *Humanitarian Intervention and the United Nations*.

¹⁶ *International Law and the Use of Force by States*.

(Foreign and Commonwealth Office, Foreign Policy Document, No. 148, pp. 2-9 (some footnotes giving cross-references deleted))

In the UN Security Council on 17 January 1986, the UK Permanent Representative to the UN in New York, Sir John Thomson, stated:

The Government of Israel holds the view that cross-border attacks on its territory launched from Lebanon are unacceptable. No member of the Council, entrusted as we are with primary responsibility for international peace and security, can disagree with that. The Council equally cannot and does not accept, as it has demonstrated in a number of resolutions, that Israel may flout the United Nations Charter by invading and occupying another State or any part of its territory.

That is not a new or novel view of the problem. It is the underlying reality which needs constantly to be re-emphasized. My Government, it goes without saying, stands by Security Council resolution 242 (1967) and by Israel's right to exist in peace and security within recognized boundaries. By the same token, we are resolutely opposed to Israel's taking measures that have the effect of denying access to the same right to neighbouring States, such as Lebanon.

(S/PV. 2642, pp. 9-10)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We are not aware that the Soviet Union has annexed any part of Afghanistan,

but we have certainly made our views clear about the Soviet occupation of that country. We have voted for all seven United Nations General Assembly resolutions calling for the withdrawal of foreign troops, the restoration of Afghanistan's independence and non-aligned character, the right of the Afghan people to self-determination and the return of refugees in safety and honour. We fully support the efforts of the United Nations Secretary General to find a peaceful settlement on this basis. The withdrawal of Soviet troops remains the key to peace.

(HC Debs., vol. 94, Written Answers, col. 143: 18 March 1986; see also *ibid.*, col. 114)

Following a raid by South African forces into Botswana, Zambia and Zimbabwe, the Foreign and Commonwealth Office stated at a press conference held on 19 May 1986:

. . . HMG strongly condemned these violations of the sovereignty of fellow Commonwealth countries and deplored any loss of life involved.

(Text provided by the Foreign and Commonwealth Office; see also HC Debs., vol. 98, col. 19: 19 May 1986 and *ibid.*, vol. 99, Written Answers, cols. 228-30: 11 June 1986)

In a speech in the Security Council on the same subject on 23 May 1986, the Permanent Representative of the UK, Sir John Thomson, stated in part:

Let South Africa understand that we have never countenanced and shall never countenance cross-border violations and South Africa's illegitimate use of force against its neighbours. The recent threats to renew such attacks are totally unacceptable to my Government.

(S/PV. 2686, pp. 14-15)

In reply to the question

Whether the Israeli raid on Tunis and the American raid on Libya paved the way for the South African raids on Zambia, Zimbabwe and Botswana and whether it is [Her Majesty's Government's] view that in each case the raids were violations of the sovereignty of the nations whose territory was invaded from the air,

the Minister of State, Foreign and Commonwealth Office, wrote:

No. The raids on Zambia, Zimbabwe and Botswana were clear violations of sovereignty, as was the raid on Tunis. We condemned all four. The United States invoked the right of self-defence, recognised by Article 51 of the UN Charter, in their action against clearly defined targets in Libya related to terrorism.

(HL Debs., vol. 477, col. 580: 27 June 1986)

In a speech made on 8 July 1986 to the International Conference for Immediate Independence of Namibia, held in Vienna, the UK representative, Mr M. Wilmshurst, on behalf of the twelve Member States of the European Community, stated:

South Africa has also, in defiance of international law, continued its armed incursion into Namibia's neighbours, particularly Angola, thus imperilling their sovereignty and creating a grave danger to peace and security in the region.

(Text provided by the Foreign and Commonwealth Office)

Article 2 of the Agreement concerning the Settlement of Mutual Financial and Property Claims arising before 1939, concluded between the Governments of the UK and the Soviet Union on 15 July 1986, reads in part as follows:

The Government of the Union of Soviet Socialist Republics shall neither on its own behalf nor on behalf of its physical and juridical persons pursue with the Government of the United Kingdom or support claims arising before 1 January 1939, in particular:

- (a) claims on the ground of intervention between 7 November 1917 and 16 March 1921 or arising from any armed operations or hostile measures during that period; . . .

(TS No. 65 (1986); Cm. 30)

At a press conference held by the Foreign and Commonwealth Office on 13 August 1986, the following statement was issued:

We have noted with concern reports of South African military action in the Cuito Canavale area inside Angola. We consistently condemn all violations of the sovereignty and territorial integrity of Angola. Furthermore, we cannot accept any suggestion that such actions are justified on the grounds of South Africa's occupation of Namibia which is unlawful. We call upon South Africa to withdraw its forces both from Angola and from Namibia.

(Text provided by the Foreign and Commonwealth Office)

Part Thirteen: I. E. Coercion and use of force short of war—unilateral acts—other unilateral acts, including self-defence

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We imposed restrictions on arms sales to Israel in direct response to the Israeli invasion of Lebanon in 1982. We welcomed Israel's decision to withdraw, but are disappointed by the residual Israeli presence on Lebanese territory. Our policy is kept under review.

(HC Debs., vol. 90, Written Answers, cols. 367-8: 27 January 1986)

In the course of a debate on the subject of European Community shipping policy, the Secretary of State for Transport, Mr Nicholas Ridley, stated:

. . . before starting on the Community's shipping policy, I must refer to the question of British Ferries Sealink's access to Belgian ports, which has been mentioned in the House on more than one occasion. As this issue has not yet been resolved, my officials yesterday issued letters of consultation about the

possible use of section 14 of the Merchant Shipping Act 1974 to restrict the access of the Belgian state ferry company—RMT—to United Kingdom ports. I am sure that this makes it clear how seriously I am taking this problem. I hope that BFS will now very quickly receive approval for the service which it wishes to operate.

(Ibid., vol. 93, col. 815: 11 March 1986)

[Section 14 of the Merchant Shipping Act 1974 reads in part as follows:

PROTECTION OF SHIPPING AND TRADING INTERESTS

14.—(1) The Secretary of State may exercise the powers conferred by this section if he is satisfied that a foreign government, or any agency or authority of a foreign government, have adopted, or propose to adopt, measures or practices concerning or affecting the carriage of goods by sea which—

- (a) are damaging or threaten to damage the shipping or trading interests of the United Kingdom, or
- (b) are damaging or threaten to damage the shipping or trading interests of another country, and the Secretary of State is satisfied that action under this section would be in fulfilment of the international obligations of Her Majesty's Government to that other country.

...

- (3) The Secretary of State may by order provide for—

...

- (b) regulating the admission and departure of ships to and from United Kingdom ports, the cargoes they may carry, and the loading or unloading of cargoes;
...]

At a press conference held by the Foreign and Commonwealth Office on 27 March 1986, a question was asked about the protection zone around the Falkland Islands. In reply, it was stated:

... the 150-mile zone applied only to Argentine vessels, not to vessels of other nations. Asked if it affected all types of Argentine ships, Spokesman replied that Argentine merchant ships could apply for permission to enter the zone. He added that, before lifting the [Falklands Islands Protection Zone], HMG would have to have convincing evidence that Argentina had ended its state of hostilities with the UK.

(Text provided by the Foreign and Commonwealth Office)

In reply to a question, the Secretary of State for Foreign and Commonwealth Affairs wrote:

Following the commitment given by the Commonwealth Heads of Government in Nassau last October, we have been considering what action might be possible to preclude the import of Kruggerands. Account has been taken of the fact that South Africa is now minting the new Protea coin.

We have now decided that the import of all gold coins originating in South Africa, and consigned to the United Kingdom from that country, shall be

prohibited with effect from midnight tonight. A copy of Notice to Importers 2086, detailing these arrangements, is being placed in the library of the House.

(HC Debs., vol. 98, Written Answers, col. 327: 22 May 1986)

In the course of a speech given to the American Bar Association in Washington on 30 June 1986, the Attorney-General, Sir Michael Havers, said:

It is not only by formal agreements that international co-operation against terrorism can be evidenced. You will have seen the statement on terrorism that emerged from the meeting at the Tokyo Economic Summit in May this year. The statement recognised the concept of terrorism which is supported or sponsored by a State. We had in mind, of course, Libya. In the United Kingdom we have taken a number of significant measures to respond to this threat, including closing the Libyan People's Bureau, stricter immigration controls and a ban on new defence contracts. We understand and sympathise with the reasons behind the United States' blocking of Libyan assets and, as a matter of public policy, we will not object to this particular measure and will not undermine it.

(Text provided by the Foreign and Commonwealth Office)

The following press release was issued by the Department of Transport on 2 October 1986:

GOVERNMENT STOPS LIBYAN ARAB AIRLINES FLIGHTS TO UK

John Moore, Secretary of State for Transport, announced today that flights by Libyan Arab Airlines to the UK will stop at the end of October. He issued the following statement.

The involvement of Libyan Arab Airlines in support of terrorist activity makes it inappropriate in the Government's view for air services between the two countries to continue. The Government are therefore informing the Libyan authorities through the protecting power (Saudi Arabia) that they have decided to cease the administrative application of the UK-Libya Air Services Agreement of 20 December 1972 from 31 October when the temporary operating permits issued by the Department of Transport to LAA expire. In the meantime further security measures will be applied to LAA flights at Heathrow.

[Editorial note: The above Agreement had not entered into force and prior to the above action was being applied only administratively]

In the course of a speech on 11 November 1986 to the Sixth Committee of the UN General Assembly considering the report of the International Law Commission, the UK representative, Sir John Freeland, discussed the draft articles on State responsibility. He remarked:

While, as I have said, we support the establishment of machinery for the peaceful settlement of disputes, my Government take the realistic approach that the power to impose reasonable and proportional countermeasures, when combined with an effective compulsory settlement of disputes procedure, is one of the most effective ways not only of resolving international disputes, but also of preventing breaches of international obligations.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/41/SR. 39, p. 5)

Following UK allegations that the Syrian Embassy in London played a part in terrorist activity against an Israeli aircraft at Heathrow Airport, the following note, dated 24 October 1986, was delivered to the Syrian Ambassador:

Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs presents his compliments to the Ambassador of the Syrian Arab Republic and has the honour to state that Her Majesty's Government are breaking off diplomatic relations with the Government of the Syrian Arab Republic. The Ambassador and his staff should leave the United Kingdom at the earliest possible time and in any event no later than midnight on the night of 7/8 November 1986.

If the Syrian Government intend to ask a third country to act as Protecting Power for Syrian interests in the United Kingdom, they should consult Her Majesty's Government as soon as possible on the identity of the Power whom they wish to protect their interests. HMG would raise no objection to an interests section staffed by an agreed number of Syrian personnel being maintained within the Embassy of the proposed Protecting Power, on the understanding that reciprocal arrangements would be agreed for a British interests section in Damascus.

(Text provided by the Foreign and Commonwealth Office)

In a statement in the House of Commons on the above matter, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated in part:

The whole House will be outraged by the Syrian role in this case. It is unacceptable that the ambassador, members of his staff, and the Syrian authorities in Damascus should be involved with a criminal like Hindawi. We have therefore decided to break diplomatic relations with Syria. Dr. Haydar was informed of this decision this morning and was told to close his embassy and leave the country within 14 days. The British embassy in Damascus will also be closed. We shall seek to make alternative arrangements of the usual kind for the protection of British interests in Syria. We are also tightening the security arrangements surrounding the operations in London of Syrian Arab Airlines by imposing special controls on all Syrian Arab Airlines aircraft and crew, including stricter searches of personnel, passengers and baggage. The House will recall that last June we introduced a tougher and stricter visa regime for Syrians wishing to enter the United Kingdom. We shall maintain and strengthen this regime.

(HC Debs., vol. 102, col. 1503: 24 October 1986)

A further note, dated 27 October 1986, was delivered to the Syrian Ambassador in the following terms:

Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs presents his compliments to the Ambassador of the Syrian Arab Republic and has the honour to refer to his Note of 24 October in which he stated that Her Majesty's Government are breaking off diplomatic relations with the

Government of the Syrian Arab Republic. In view of the Syrian Government's unjustified decision to expel the staff of the British Embassy and British Council within 7 days, the British Government require that the Ambassador and his staff should leave the United Kingdom at the earliest possible time and in any event no later than midnight on the night of 31 October/1 November 1986.

(Text provided by the Foreign and Commonwealth Office)

The following note, dated 1 December 1986, was delivered to the Lebanese Embassy in London:

The Maritime, Aviation and Environment Department of the Foreign and Commonwealth Office presents its compliments to the Lebanese Embassy and has the honour to request the Embassy, as Protecting Power of Syria, to inform the Syrian Government that in response to the Syrian Government's withdrawal without notice of the right of British airlines to fly within Syrian airspace, Her Majesty's Government have decided to take certain action details of which are set out in a letter from the Department of Transport to Syrian Arab Airlines a copy of which is annexed to this Note.

The letter mentioned above, dated 28 November 1986, read as follows:

As you will be aware the Syrian Government has withdrawn without notice the right of British airlines to fly within Syrian airspace. In the opinion of Her Majesty's Government this action amounts to a flagrant contravention of the Agreement between Her Majesty's Government and the Government of the Syrian Republic for scheduled civil air services between and beyond their respective territories of 30 January 1954.

Accordingly I have to inform you that as a consequence of this, Her Majesty's Government have decided to take the following actions:

- (i) Syrian Arab Airlines may no longer overfly the United Kingdom; and
- (ii) the Secretary of State for Transport is considering in accordance with Article 62 of the Air Navigation Order 1985 whether to revoke the permission which has been granted to Syrian Arab Airlines pursuant to Article 83 of the Air Navigation Order 1985 to take on board and discharge passengers in the United Kingdom for the current winter season. Pending that consideration the Secretary of State hereby provisionally suspends that permission, in accordance with Article 62, with immediate effect.

If there are any matters you would wish to have taken into account by the Secretary of State in the consideration of this matter I must ask you to inform me of them by 26 December 1986.

(Texts provided by the Foreign and Commonwealth Office)

Part Thirteen: II. A. Coercion and use of force short of war—collective measures—regime of the UN

(See also Part Thirteen: I. D. (item of July 1984), above)

In the course of a debate on the subject of South Africa, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

... the British Government, for their part, comply fully with Security Council

Resolution 418 which forbids the sale to South Africa of arms and related material and calls on states to refrain from any co-operation with South Africa in the manufacture and development of nuclear weapons. We believe that all other UN member states should similarly comply with this mandatory embargo. (HL Debs., vol. 474, col. 378: 30 April 1986; see also HC Debs., vol. 101, Written Answers, col. 440: 15 July 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

In accordance with the United Nations arms embargo, we do not supply spares for military aircraft to South Africa.

(HC Debs., vol. 99, Written Answers, col. 229: 11 June 1986; see also *ibid.*, vol. 102, Written Answers, col. 71: 21 June 1986)

On 28 November 1986, in the UN Security Council, the UK Permanent Representative, Sir John Thomson, stated:

On 4 November 1977 the Security Council decided, by its resolution 418 (1977) to impose a mandatory arms embargo against South Africa. The United Kingdom supported that resolution and also joined in the adoption of resolutions 421 (1977), establishing the Committee whose report is before us today, and 558 (1984), under which all States were requested to refrain from importing arms, ammunition and military vehicles from South Africa. Before 1977 the United Kingdom Government had for a number of years been applying a voluntary embargo on arms sales to South Africa.

I should like to reaffirm our commitment to the embargo imposed under resolution 418 (1977). We have implemented this rigorously. Those under British jurisdiction who have broken the embargo have been prosecuted in the British courts. In our view the embargo remains an effective instrument for the purpose for which it was intended.

(S/PV. 2723, pp. 12-13)

Part Thirteen: II. B. *Coercion and use of force short of war—collective measures—collective measures outside the UN*

(See also Part Thirteen: I. D. (item of July 1984), above)

In answer to the question what controls exist to enforce the embargo on certain imports from South Africa, as agreed in the Commonwealth accord on southern Africa adopted on 20 October 1985, the Minister of State, Department of Trade and Industry, wrote:

Under powers provided by the Import of Goods (Control) Order 1954 applications have to be made for specific import licences for any imports of arms or ammunition from South Africa. No arms, ammunition, military vehicles or paramilitary equipment are procured from South Africa for the armed forces.

(HC Debs., vol. 101, Written Answers, col. 525: 16 July 1986; see also *ibid.*, vol. 102, Written Answers, col. 7: 21 July 1986)

The Presidency of the European Community, then held by the UK,

issued a press statement on 10 November 1986 on the subject of Syrian complicity in terrorism. It read in part as follows:

1. Following on from our discussion on 27 October of Syrian involvement in the Hindawi case, we have all agreed that further joint action is essential to protect our citizens from any possible repetition of such acts of terrorism.

2. No-one should be in any doubt about our unanimous condemnation of international terrorism and our resolve to curb terrorism in all its forms. We wish to send Syria the clearest possible message that what has happened is absolutely unacceptable.

3. We stand firmly by the commitments in previous statements and have therefore decided that the following additional action is required. In the present circumstances:

- we shall not authorise new arms sales to Syria;
- we shall suspend high-level visits to or from Syria;
- we shall each review the activities of Syrian Diplomatic and Consular missions accredited in our country and apply appropriate measures;
- we shall each review and tighten security precautions surrounding the operations of Syrianair.

(Text provided by the Foreign and Commonwealth Office)

Part Fourteen: I. A. 3. *Armed conflicts—international war—resort to war—limitation and reduction of armaments*

In reply to the question whether Her Majesty's Government has evidence that the Soviet Union has violated the anti-ballistic missile treaty, the Minister of State for Defence Support, Lord Trefgarne, stated:

... there certainly is evidence to suggest that the Soviet Union has violated the treaty, although in some areas I recognise that there is room for more than one view.

(HL Debs., vol. 470, col. 108: 21 January 1986)

In reply to the question 'Whether it is only the fact that Fylingdales was in existence before 1972 that saves it from violating the ABM Treaty', the Minister of State, Foreign and Commonwealth Office, wrote:

We are confident that the existence and modernisation of the early warning installation at RAF Fylingdales are in full conformity with US obligations under the ABM Treaty.

(Ibid., vol. 476, col. 1026: 18 June 1986)

Part Fourteen: I. B. 7. *Armed conflicts—international war—the laws of war—humanitarian law*

(See also Part Six: I. B, above and Part Fourteen: I. B. 8., below)

On 24 February 1986, in the UN Security Council, the UK Permanent Representative to the UN in New York, Sir John Thomson, referred to the Iran/Iraq conflict and continued:

While the Council's clear programme, as I have stated, should be an early cease-fire followed by withdrawal and negotiations, there are aspects of this bitter conflict which, until it ends, also rightly and gravely concern us. They include the treatment of prisoners of war, a matter on which both sides appear to be in serious breach of their international obligations. There is also the question of the bombardment on various occasions of civilian centres in contravention of international law under the Geneva Conventions of 1949.

(S/PV. 2666, pp. 21-2; see also S/PV. 2713, p. 42 of 8 October 1986 and A/41/PV. 85, pp. 2-7 of 25 November 1986)

In reply to a question, the Minister of State for Defence Procurement wrote in part:

Existing laws of war already impose restrictions on attacks on [nuclear] installations which would pose a particular threat to civilian populations and require a balance to be struck between the military advantage and the danger of collateral damage to the civilian population.

(HL Debs., vol. 476, col. 112: 10 June 1986)

In the course of a debate in the Security Council on 8 October 1986 on the subject of the conflict between Iran and Iraq, the UK representative, Mr P. Gore-Booth, observed:

We are . . . alarmed by the tendency, demonstrated by the growing number of attacks by both sides on civilian targets, to ignore their obligations relating to the protection of civilian populations in time of war. We wish to stress, in the case of these hostilities, as in the case of any others, the importance of upholding the corpus of humanitarian law in armed conflict, including the Geneva Conventions of 1949. Similarly, we are gravely concerned by the continuing occurrence of attacks on vessels flying the flag of States which are not involved in the current hostilities, including my own, causing the loss of many lives and serious damage to ships and cargoes. It is, needless to say, wholly unacceptable to my Government that armed attacks should continue to be directed in this way against merchant vessels.

(S/PV. 2713, p. 42)

In a speech to the Third Committee of the UN General Assembly on 18 November 1986 on the subject of the report of ECOSOC, the UK representative, Mr J. Birch, on behalf of the twelve Member States of the European Community, said of guerrilla activities in Central America:

The Twelve call upon both sides to observe scrupulously the relevant international norms of humanitarian treatment as set out in the Geneva Conventions and the Additional Protocols thereto.

(Text provided by the Foreign and Commonwealth Office; see also A/C. 3/41/SR. 49, p. 13)

Part Fourteen: I. B. 8. *Armed conflict—international war—the laws of war—belligerent occupation*

In reply to a question on the subject of Israeli settlement on the West

Bank, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

We have repeatedly made it clear to Israel that its settlement policy is illegal and is an obstacle to peace.

(HC Debs., vol. 91, col. 271: 5 February 1986; see also speech of Sir John Thomson in UN General Assembly, 25 November 1986 (A/41/PV. 85, pp. 2-7))

In the course of a speech on 13 November 1986 in the Special Political Committee of the UN General Assembly, the UK representative, Mr J. Birch, on behalf of the twelve Member States of the European Community, stated:

There can be no doubt that the provisions of the Fourth Hague Convention of 1907 and the Fourth Geneva Convention of 1949 are applicable to the Arab territories occupied by Israel since 1967. We are seriously concerned by the refusal of the Occupying Power to acknowledge this. Any change in the status and demographic structure of these territories, including the establishment of settlements, are illegal under international law. In this context we reaffirm the inadmissibility of the acquisition of territory by force, a principle of international law to which Resolution 242 of the Security Council also refers.

The Twelve therefore continue to be especially concerned at the Israeli practice and policy of creating settlements in the Occupied Territories, and of expanding the settlements which have already been established. We take note with grave concern of recent statements by the Israeli Government advocating an intensification of this trend. We note, for example, the growth of the settler population on the West Bank by about 8,000 to 10,000 people in the past year, and that the drive to take over more land continues unabated. The presence of Israeli settlers in the Occupied Territories has led inevitably to friction with the local inhabitants, who justifiably oppose this policy which results in demographic changes illegal in international law and unacceptable to world public opinion.

...
The Twelve also wish to express our strong concern at continuing reports of arbitrary acts by the Israeli occupation authorities. The measures re-introduced in August 1985 have recently again shown signs of being applied rigorously. Administrative detention is still practised, some 30 Palestinians being so detained at the end of October. Town arrest has become more common, being also at the end of October applied to at least 48 Palestinians. Deportations continue, contrary to the Fourth Geneva Convention; at least 12 cases have been recorded in the past year, and six more cases are pending actions in the Israeli High Court. Collective punishment is imposed in an arbitrary fashion by curfews and by restrictions on travel across the Jordan bridges. The unacceptable practice continues of the demolition and sealing of the houses belonging to the families of those detained.

...
The Twelve are also bound to restate our view that the policy by which Israel seeks to impose its civil administration on the Occupied Territories is unacceptable. It is of course the case that a military occupation is regarded as only a temporary situation and cannot confer upon the Occupying Power rights

of annexation or disposal or of extending its law, jurisdiction or administration in the occupied area. Such an extension is tantamount to annexation and thereby, being contrary to international law, is invalid.

The continuation of the state of emergency declared last year by the occupation authorities on the West Bank and in Gaza is only acceptable to the extent that its application is compatible with the Fourth Geneva Convention.

The Twelve are particularly conscious of the importance of the status of Jerusalem, a city which is considered holy by three major religions. We reject any unilateral measure which seeks to modify its status. We regard it as essential that the protection of unimpeded access by all to the Holy Places must be guaranteed now and in any future agreement on Jerusalem.

The Twelve continue strongly to condemn Israel's decision to extend its law, jurisdiction and administration to the Golan Heights. We consider this decision to be invalid as it is contrary to international law.

(Text provided by the Foreign and Commonwealth Office; see also A/SPC/41/SR. 27, pp. 8-10; see also statement by Sir John Thomson in UN General Assembly on 25 November 1986: A/41/PV. 85, pp. 2-7)

Part Fourteen: I. B. 10. *Armed conflicts—international war—the laws of war—nuclear, bacteriological and chemical weapons*

At a press conference on 20 February 1986, the Foreign and Commonwealth Office issued the following statement:

HMG has consistently and unreservedly condemned the use and supply of chemical weapons wherever and whenever it has occurred. HMG has supported the statement of 17 April 1985 by the UN Security Council which strongly condemned the renewed use of chemical weapons in the Iran/Iraq conflict and any future use of such weapons and which urged the strict observance of the Geneva Protocol of 1925 according to which the use of chemical weapons is prohibited.

(Text provided by the Foreign and Commonwealth Office)

In the course of a debate in the House of Lords on the subject of the legal status of nuclear war, the Minister of State for Defence Support, Lord Trefgarne, stated:

There is no rule of international law dealing specifically with the use of nuclear weapons. The use of such weapons is governed by the general laws of war. Thus any use of nuclear weapons would have to be judged as lawful or not in the light of the particular circumstances in which they were used, just as is the case with any other weapon. Neither can it be said—in spite of noble Lords opposite—that the use or possession of nuclear weapons is prohibited, by analogy, by treaties dealing with other types of weapons.

Experience has shown that in the progressive development of arms control measures it has not been possible to extrapolate from earlier rules of international law, whether customary or conventional, in order to take account of technical progress. It has always proved necessary to develop new agreements to cope with new weapons and new situations. There may be some superficial appeal, for example, in drawing an analogy between nuclear weapons and poison, poisoned

weapons or poisonous gas, but it has to be recognised that a nuclear weapon is in fact none of those and is of a quite different nature.

It is worth recalling that all five nuclear weapons states—the United States, USSR, United Kingdom, France and China—have given assurances that they will not use nuclear weapons against non-nuclear weapons states, save in defined circumstances. Those are the so-called negative security assurances. In the case of the United Kingdom, the assurance was by the United Kingdom delegation at the First United Nations Special Session on Disarmament in May 1978, in the following terms:

‘We are now ready to give the following assurance to non-nuclear weapon states which are parties to the Non-Proliferation Treaty or other international binding commitments not to manufacture or acquire nuclear explosive devices. Britain undertakes not to use nuclear weapons against such States except in the case of an attack on the United Kingdom, its dependent territories, its Armed Forces or its allies by such a State in association or alliance with a Nuclear Weapon State’.

(HL Debs., vol. 472, col. 645: 12 March 1986)

As I have explained, the Government do not accept that it is either immoral or illegal to retain nuclear weapons to prevent others using force, or the threat of force, against us.

(Ibid., cols. 647–8)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

On 14 March 1986 the Secretary General released the report of a team of specialists on allegations of the use of chemical weapons in the conflict between Iran and Iraq. In his covering note the Secretary General stated that the specialists had confirmed the use of chemical weapons by Iraqi forces against Iranian forces in the course of the present Iranian offensive into Iraqi territory. The report is being considered by the United Nations Security Council and the United Kingdom is closely involved in these discussions. Our policy on chemical weapons is well known: we condemn the use of chemical weapons wherever and whenever it occurs, including the clear breach of the Geneva protocol detailed in the Secretary General’s report.

(HC Debs., vol. 94, Written Answers, col. 260: 20 March 1986)

In reply to a later question on the same subject, the Minister of State wrote in part:

We unreservedly support the statement made by the President of the Security Council on 21 March on the recent report of the United Nations Secretary-General’s mission to investigate chemical weapons use in the Iran–Iraq conflict. That report unanimously concluded that chemical weapons had been used by Iraqi forces against Iranian forces. We greatly regret that Iraq has been clearly shown to have been in violation of the Geneva protocol of 1925, which prohibits the use of such weapons.

(Ibid., col. 410: 25 March 1986; see also *ibid.*, vol. 95, col. 152: 9 April 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, stated:

We have at all times complied with our obligations under Additional Protocols I and II of the Treaty of Tlatelolco not to deploy nuclear weapons in territories for which it is internationally responsible and which lie within the treaty's zone of application. We have also carried out our obligation not to deploy nuclear weapons in areas for which the treaty is in force.

(HL Debs., vol. 473, col. 872: 17 April 1986)

In reply to a question, the Minister of State for Defence Procurement wrote:

The relevant treaty signed in 1963 was the limited test ban treaty. Since its signing, the United Kingdom has conducted 16 nuclear weapons tests. These were carried out in collaboration with the United States and the conditions of the treaty were honoured in full.

(HC Debs., vol. 96, Written Answers, col. 261: 25 April 1986)

In reply to a question, the Parliamentary Under-Secretary of State, Department of Energy, wrote:

Nuclear material has on occasion been withdrawn from Euratom safeguards for national security reasons in accordance with the provisions of the UK-Euratom-IAEA safeguards agreement.

(Ibid., col. 458: 1 May 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We attach a high priority to the agreement of a global and verifiable ban on all chemical weapons, which we believe will need to include controls on the manufacture of certain chemicals in civil industry. The United Kingdom abandoned its chemical warfare capability in the 1950s. Following the use of chemical weapons in the Gulf conflict, controls have been imposed on the export of certain civil chemicals which could be used in the manufacture of lethal chemical agents.

(Ibid., vol. 97, Written Answers, col. 352: 12 May 1986)

In reply to a question, the Minister of State for the Armed Forces wrote:

All the members of NATO are parties to the 1925 Geneva protocol which prohibits the use of chemical weapons, although some countries have reserved the right to retaliate with chemical weapons against states which first use chemical weapons against them. All NATO countries are therefore in effect committed to no first use of chemical weapons.

(Ibid., vol. 98, Written Answers, col. 175: 20 May 1986)

In reply to the question

Whether . . . either the United States or the Soviet Union has violated the 1963 Partial Test Ban Treaty or the (unratified) Threshold Test Ban Treaty and if so when and how,

the Minister of State, Foreign and Commonwealth Office, wrote:

We believe that any infringements of the 1963 Partial Test Ban Treaty have been of a minor technical nature as a result of accidental venting of radioactive gases from underground nuclear tests. The UK is not a party to the Threshold Test Ban Treaty and estimates of nuclear test yields are subject to varying degrees of uncertainty. But we agree that certain Soviet tests in the past give rise to legitimate causes of concern about their compliance with this treaty. We have strongly urged the Soviet Union to satisfy this concern.

(HL Debs., vol. 475, col. 537: 22 May 1986)

In reply to the question what steps have been taken to prevent the use of chemical weapons in the Iran/Iraq war, the Minister of State, Foreign and Commonwealth Office, wrote:

Following the first confirmation in March 1984 of the use of chemical weapons in the Gulf conflict, the UK imposed controls on the export of five chemicals which were capable of being misused to make such weapons. Similar controls have also been imposed by a number of other countries. The UK has kept these controls under continuous review since their introduction, and they now cover 10 chemicals.

In addition, a longer list of chemicals has been drawn up as a result of international consultation, to indicate other chemicals which can be used to manufacture lethal chemical agents. This warning list is intended to supplement these formal controls and is being issued to the UK chemical industry and to chemical traders. It will provide an aid to industry, by alerting it to the possible dangers of misuse of these chemicals and to enable industry to take action on a voluntary basis in case of doubt or suspicion. The list is being introduced into 18 countries (the 12 EC member states, US, Canada, Japan, Australia, New Zealand and Norway) and is intended to inhibit the spread of chemical weapons. At the same time there is no intention of interfering in the widespread normal and legitimate civil trade in many of the chemicals on the list.

The warning list reflects a determination by all the countries concerned to enhance the authority of the 1925 Geneva Protocol and to prevent any damage to the prospects for the negotiations in Geneva for a comprehensive ban on all chemical weapons.

(Ibid., vol. 476, col. 248: 10 June 1986; see also HC Debs., vol. 99, Written Answers, cols. 289-90: 12 June 1986)

In the course of a debate in the UN Security Council on 8 October 1986 on the conflict between Iran and Iraq, the UK representative, Mr P. Gore-Booth, stated:

The views of my delegation on the use of chemical weapons are well known: we are implacably opposed to their use which is in contravention of the Geneva protocol of 1925. The Security Council has strongly condemned the use of chemical weapons, most recently in its statement on 21 March this year.

(S/PV. 2713, p. 42)

Part Fourteen: I. B. 12. *Armed conflicts—international war—the laws of war—termination of war, treaties of peace, termination of hostilities*

In reply to a question, the Parliamentary Under-Secretary of State, Department of Health and Social Security, wrote:

Under articles 14 and 16 of the treaty of peace with Japan, just over £4.6 million was received from Japan and about £175,000 from Thailand. During the early 1950s about £4.25 million of the total was distributed to some 59,000 former prisoners of war and civilian internees through the then Ministry of Pensions and the International Committee of the Red Cross. Apart from £3,000 held to meet possible future claims, the remainder is now held in a trust fund administered by the Far East (Prisoners of War and Internees) Fund.

(HC Debs., vol. 98, Written Answers, col. 386: 23 May 1986)

Part Fourteen: II. A. *Armed conflicts—civil war—rights and duties of States*

(See Part Thirteen: I. D. (item of July 1984), above)

Part Fourteen: III. *Armed conflicts—self-defence*

(See also Part Nine: III. and VII. D. and Part Thirteen: I. D. (items of July 1984 and 27 June 1986), above)

In reply to a question about attacks on British ships in the Gulf, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, said:

We deplore the attacks on innocent merchant vessels and have taken action to prevent interference with shipping, consistent with Article 51 of the United Nations Charter.

(Ibid., vol. 91, col. 273: 5 February 1986)

In reply to the question whether there is a difference between stopping and boarding a ship and the same country intercepting an aircraft, the Minister of State, Foreign and Commonwealth Office, Mr Timothy Renton, stated:

Under article 51 of the United Nations charter there is a specific and inherent right of self-defence by stopping and searching foreign merchant ships on the high seas. The Iranians are using that specific right to stop merchant ships. As my right hon. and learned Friend [Sir Geoffrey Howe] said earlier, the international convention on hijacking means that terrorists should be brought to trial either by prosecution or extradition.

(Ibid., cols. 278–9: 5 February 1986)

In the course of a debate in the House of Lords on the subject of the legal status of nuclear war, the Minister of State for Defence Support, Lord Trefgarne, said:

The United Kingdom of course has pursued the policy of deterrence, firmly

based on a strategy that is entirely defensive. The inherent right of self-defence is recognised by the UN charter. We seek no first strike capability. As NATO leaders have repeatedly made clear, no NATO weapon, nuclear or conventional, will ever be used in Europe except in response to attack. The Soviet Union has never given a comparable assurance.

(HL Debs., vol. 472, col. 644: 12 March 1986)

In reply to a question from the Leader of the Opposition about an aerial incident over the Gulf of Sirte, the Prime Minister, Mrs Margaret Thatcher, said:

I have expressed a clear opinion and shall express it again. It is important that international waters and airspace be kept open. The United States was operating in international waters and airspace and we support its right to operate that way. Its planes were attacked by missiles. The missiles did not hit. In pursuance of article 51 of the United Nations charter, the United States is entitled to act in self-defence against such attacks.

(HC Debs., vol. 94, col. 782: 25 March 1986)

On 27 March 1986, in the UN Security Council, the UK Permanent Representative to the UN in New York, Sir John Thomson, stated of the above attack on US aircraft by Libyan aircraft over the Gulf of Sirte:

Given acceptance of the principle of freedom of navigation and the circumstances of the case, it is impossible to argue convincingly that the United States forces involved in the incident before us were doing other than exercising their right to the freedom of navigation in international waters and air space in accordance with international law. There was therefore no justification for the attack made on them by Libyan missiles on 24 March. The Libyan authorities claimed to have shot down three United States aircraft, apparently over waters which the vast majority of the world recognizes as international waters. The Libyans were apparently mistaken in their claim to have shot down the aircraft, but the fact of an attack on United States aircraft seems clear and has not been denied. There can be no doubt that the attack constituted a breach of Libya's obligations under international law, in particular Article 2 (iv) of the United Nations Charter. The United States forces, having been attacked and further threatened, exercised their right of self-defence under Article 51 of the Charter. This response was proportionate and wholly justifiable. It was duly reported to the Security Council as provided for in Article 51.

The facts are clear, the principle of freedom of navigation is of great and universal importance, Libya's action in arrogating part of the high seas to itself was illegal and provocative, the attack on the United States aircraft was unjustified, the United States response was proportionate and legitimate. What more is there to say? This is a clear case in which the Council should uphold the principles concerned, urge the parties to observe restraint and call for the strict observance of international law.

(S/PV. 2669, pp. 36-7)

At a press conference held by the Foreign and Commonwealth Office on 14 April 1986, the following statement was made:

... in all its discussions with its partners Britain had taken as its starting point that any response to acts of terrorism must take into account the provisions of international law including the right to self defence.

At a later press conference, held on 15 April 1986, following the US bombing raid on Libya, it was stated:

... the British Government was satisfied that the US action was justified under Article 51 of the UN Charter.

(Texts provided by the Foreign and Commonwealth Office)

In reply to oral questions in the House of Commons in the same incident, the Prime Minister, Mrs Margaret Thatcher, stated:

I believe that the attacks made by the United States on Libya were within the inherent right of self-defence under article 51. That was why we gave our support to that action and our consent to the use of bases in Britain for that purpose.

...
As I indicated, I believe that the United States action against terrorist-related targets, undertaken in the light of evidence that further terrorist attacks were planned, was within the inherent right of self-defence under article 51.

...
... action by the United States took place against continued state-sponsored terrorism by Libya. I believe we were entitled to use, that the United States was entitled to use, its inherent right of self-defence. If one refuses to take any risks because of the consequences, the terrorist Governments will win and one can only cringe before them.

...
There has been an escalation in terrorism for some time. We have all been subjected to it in this country, as well as elsewhere. The question was, at what time did one attempt, or the United States attempt, to invoke the right of self-defence, or were we to continue being passive and supine? I believe that, under the circumstances, the United States was acting within article 51 in exercising its inherent right of self-defence to try to turn the tide against terrorism, and to discourage those who engage in it and state sponsored terrorism, from engaging in further attacks.

(HC Debs., vol. 95, cols. 723-4: 15 April 1986)

In reply to the question whether there was discussion with the President of the US about the acceptable level of civil destruction that might follow an attack upon Libya, the Prime Minister replied:

The discussion was to secure targets and action proportionate to the threat, and to ensure that the action taken by the United States was within article 51. The United States and we believe that that action was within article 51.

(Ibid., cols. 724-5)

The Prime Minister was then asked the following question:

Does the Prime Minister agree that, under the Churchill-Truman agreement of 1952, the decision whether to use the bases was a matter for joint decision?

Does that lay an obligation on the Government to prove that article 51 has been fully used and to produce evidence to the Security Council?

She replied:

... the Security Council has condemned terrorism. He is also aware that that condemnation has been without effect. It did not seem that further condemnation by the Security Council would have any effect this time. The right hon. Gentleman is right. The arrangements under which American bases are used in this country have been the same for well over 30 years and they have not changed. Under those arrangements, our agreement was required. It was sought and, after discussion and question, it was obtained on the basis that the action would be on targets that were within article 51.

(Ibid., col. 725)

Finally, the Prime Minister stated:

... the United States has more than 330,000 members of her Forces in Europe to defend our liberty. Because they are here, they are subject to terrorist attack. It is inconceivable that they should be refused the right to use American aircraft and American pilots in the inherent right of self-defence, to defend their own people.

(Ibid., cols. 727-8)

In a statement to the House of Commons later on the same day, the Prime Minister said:

The House is aware that last night United States forces made attacks on specific targets in Libya.

The Government have evidence showing beyond dispute that the Libyan Government have been and are directly involved in promoting terrorist attacks against the United States and other Western countries, and that they had made plans for a wide range of further terrorist attacks.

The United Kingdom has itself suffered from Libyan terrorism. The House will recall the murder of WPC Fletcher in St. James's Square. There is no doubt, moreover, of the Libyan Government's direct and continuing support for the Provisional IRA, in the form of money and weapons.

Two years ago, we took certain measures against Libya, including the closure of the Libyan people's bureau in London, restrictions on the entry of Libyans into the United Kingdom, and a ban on new contracts for the export to Libya of defence equipment. Yesterday the Foreign Minister of the European Community reaffirmed their grave concern at Libyan-inspired terrorism and agreed on new restrictions against Libya.

Since we broke off diplomatic relations with Libya, we have had no choice but consistently to advise British nationals living and working there that they do so on their own responsibility. Our interests there have been looked after by the Italian Government. Our representative in the British interests section of the Italian Embassy will continue to advise the British community as best he can.

The United States has tried by peaceful means to deter Colonel Gaddafi and his regime from their promotion of terrorism, but to no effect.

President Reagan informed me last week that the United States intended to take military action to deter further Libyan terrorism. He sought British support

for this action. He also sought agreement, in accordance with our long-standing arrangements, to the use in the operation of some United States aircraft based in this country. This approach led to a series of exchanges including a visit by Ambassador Walters on Saturday, 12 April.

Article 51 of the UN charter specifically recognises the right to self-defence. In view of Libya's promotion of terrorism, the failure of peaceful means to deter it and the evidence that further attacks were threatened, I replied to the President that we would support action directed against specific Libyan targets demonstrably involved in the conduct and support of terrorist activities; and, further, that if the President concluded that it was necessary, we would agree to the deployment of United States aircraft from bases in the United Kingdom for that purpose.

I reserved the position of the United Kingdom on any question of further action which might be more general or less clearly directed against terrorism.

The President assured me that the operation would be limited to clearly defined targets related to terrorism, and that the risk of collateral damage would be minimised. He made it clear that use of F111 aircraft from bases in the United Kingdom was essential, because by virtue of their special characteristics they would provide the safest means of achieving particular objectives with the lowest possible risk both of civilian casualties in Libya and of casualties among United States service personnel.

Terrorism is a scourge of the modern age. Libya has been behind much of it and was planning more. The United Kingdom itself has suffered from Libya's actions. So have many of our friends, including several in the Arab world.

The United States, after trying other means, has now sought by limited military action to induce the Libyan regime to desist from terrorism. That is in the British interest. It is why the Government support the United States action. (Ibid., cols. 729-30)

In the following debate, the Prime Minister stated:

I have indicated, and I know that the United States takes the same view, that the selection of targets demonstrably in connection with terrorist activity was within article 51. That is my legal advice and I understand that it is the legal advice of the United States.

...
I am very much aware that, if there were to be any further action, it would also have to be justified under article 51. Precisely the same rules will apply to any further action as have applied to this. . . . some risks have to be faced in order to try to turn the tide against terrorism. A great deal of action has so far been taken and attempted by the United States. It has come to Europe asking for further action, and we, in Europe, have been the country that has already taken the most. The United States did not get much of a response from Europe in taking peaceful action. It had to turn to the possibility of the practical use of its right under article 51. We join the United States in hoping that that is an extra deterrent, and will encourage Colonel Gaddafi to desist from future terrorist attacks.

...
The action had to be such that it had the full legal justification for it, and our advice was that it was within article 51. I understand that that is the advice the

United States also received. We have no quarrel with the Libyan people but we do have a quarrel with state-sponsored terrorism.

(Ibid., cols. 731-9, *passim*)

During a debate on the same subject in the House of Lords, the Lord President of the Council, Viscount Whitelaw, observed:

Yes, of course, the Law Officers' opinion was certainly sought, and it having been properly sought it was concluded that the action concerned was compatible with Article 51 of the United Nations Charter in the interests of self-defence.

(HL Debs., vol. 473, col. 557: 15 April 1986)

During a further debate on the same subject in the House of Commons, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

In the speeches made throughout the debate today there has been no doubt about the implication of the Libyan Government in state-directed terrorism. That was the view of the Leader of the Opposition, the Leader of the Liberal party, the right hon. Member for Old Bexley and Sidcup, and the right hon. Gentleman for Cardiff, South and Penarth.

We know, too, that the British people are among Colonel Gaddafi's targets. We know that because of the very immediate impact on us of Libya's direct and continuing support for the Provisional IRA—support that has continued over a number of years. The House will recall the case of the motor vessel Claudia, which was intercepted by the Irish navy off the Irish coast in 1973 and which was carrying five tons of weapons from Libya for the Provisional IRA. The House remembers statements by Colonel Gaddafi himself saying that Libya is committed to support IRA terrorism in this country. Further evidence of that support was the recovery in Ireland, on 26 January this year, of rifles, pistols and ammunition supplied to the Provisional IRA that had clearly originated in Libya.

In these circumstances, there is a plain right of states to defend themselves and their citizens against attacks and sustained threat of attacks directed, promoted and organised by another state. That point was clearly put by my right hon. and learned Friend the Member for Southport (Sir I. Percival). The right hon. Gentleman the Member for Plymouth, Devonport (Dr Owen) said that in those circumstances the right of self-defence is not clearly defined, and certainly not defined in article 51. The point of that article is that although it does not define, it recognises the inherent right of states to self-defence against attack. The existence of that right is not in doubt. My right hon. Friend the Member for Chelmsford put the matter clearly when he said that the motivation for what has been done was not lust for reprisal. I will come to that. The motivation is to reduce the risk of injury from terrorism to the citizens of this country and of the rest of the world.

It must be said as well that the right of self-defence is not an entirely passive right. It plainly includes the right to destroy or weaken the capacity of one's assailant, to reduce his resources, and to weaken his will so as to discourage and prevent further violence. All that is comprised in the right of self-defence.

(HC Debs., vol. 95, cols. 953-4: 16 April 1986)

In answer to a question, the Secretary of State went on:

... the action had to be proportionate to the threat.

(Ibid., col. 955)

Speaking on 17 April 1986 in the UN Security Council, Sir John Thomson stated:

The United States has, as any of us do, the inherent right of self-defence, as reaffirmed in Article 51 of the Charter.

As Sir Geoffrey Howe said in the House of Commons yesterday, the right of self-defence is not an entirely passive right. It plainly includes the right to destroy or weaken the capacity of one's assailant, to reduce his resources, and to weaken his will so as to discourage and prevent further violence.

At the same time, the right of self-defence should be used in a proportionate way. That is why when President Reagan told Mrs Thatcher last week that the United States intended to take action, she concentrated on the principle of self-defence and the consequent need to limit the action and to relate the selection of targets clearly to terrorism.

Speaking in the House of Commons yesterday, Mrs Thatcher said: 'There were of course risks in what was proposed.' Decisions like this are never easy. The British Government's answer to the American request for the use of American aircraft based in the United Kingdom was, as Mrs. Thatcher stated, that:

'we would support action directed against specific Libyan targets demonstrably involved in the conduct and support of terrorist activities'.

President Reagan responded that the operation would be limited to clearly defined targets related to terrorism, and that every effort would be made to minimize collateral damage. The F-111s had an important role in minimizing such damage and in reducing casualties. In the interests of proportionality they were the right aircraft to use. If they had not been used more lives would probably have been lost, both on the ground and in the air.

(S/PV. 2679, pp. 27-8)

In the course of a radio interview on 27 April 1986, on the subject of the US raid on Libya, the Prime Minister, Mrs Margaret Thatcher, stated:

... the inherent right of self-defence is as old as force itself, so there is a right of self-defence. It becomes embodied specifically in article 51 of the United Nations Charter, but what article 51 [does] is that it puts into specific form a much older inherent right of self-defence. After all, if someone attacks you, you have a right to defend yourself. That is an inherent right of self-defence.

(Text provided by the Foreign and Commonwealth Office)

In the course of a further debate in the House of Lords, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

The noble and learned Lord, Lord Elwyn-Jones, and the right reverend Primate the Archbishop of York both questioned whether or not the United States action and our part in it flouted our international obligations and, in particular,

those under the United Nations Charter. The answer is that the Government believe the Americans took reasonable steps to bring home to the Libyan Government the need to refrain from continued hostile acts, but Libya did not desist and planned new attacks. So the United States Administration acted fully in accordance with international law and with the United Nations Charter.

I am aware that the United Nations Charter enjoins member states to settle their international disputes by peaceful means and to refrain from the threat or use of force; but these articles do not impair the inherent right of individual or collective self-defence under Article 51. There is a limit to the damage, in terms of lives and property, that a sovereign state can be expected to take from the planned terrorist attacks of another state. There comes a point when protests, talking and seeking reasoned assurances of good behaviour are no longer viable options and when defensive measures are legitimate. This was the case on 14th April. The United States strikes against defined targets in Libya were an act of self-defence. Under the rules of international law, the use of force is a legitimate measure of self-defence where there has been an initial attack or series of attacks by a state on another state or where such attacks are imminent.

(HC Debs., vol. 95, col. 944: 18 April 1986)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The Government of the United States of America reported in a letter of 14 April to the United Nations Secretary-General, in accordance with article 51 of the United Nations Charter, that United States forces had 'exercised the United States' right of self-defence by responding to an on-going pattern of attacks by the Government of Libya'. This letter did not refer to the use of bases in the United Kingdom.

(Ibid., vol. 96, Written Answers, col. 223: 24 April 1986)

In the course of a debate on the subject of South African military incursions into Zimbabwe, Zambia and Botswana, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

... we do not accept that Article 51 can properly be invoked in the case of the South African actions.

(HL Debs., vol. 475, col. 23: 19 May 1986)

In the course of answering questions on the subject of the US raid on Tripoli, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

The truth is that the possible risk to civilians is not a sufficient reason for rejecting the concept of self-defence in the face of terrorist action which set out deliberately and ruthlessly to maim and kill innocent civilians in many parts of the world.

The Minister of State then observed:

The United States action was in accordance with the inherent right of self-defence recognised under Article 51 of the United Nations Charter.

(Ibid., cols. 979-80: 4 June 1986; see also *ibid.*, vol. 476, col. 509: 13 June 1986)

In reply to the question

Whether [Her Majesty's Government] will give a full explanation of their belief that the United States military action against Libya was in accordance with international law and particularly the 'inherent right of self defence' as recognised in Article 51 of the UN Charter,

the Minister of State, Foreign and Commonwealth Office, wrote:

Under customary international law, states enjoy—and enjoyed long before the United Nations Charter—the right of self-defence which is expressly recognised and preserved by Article 51 of the Charter. In the light of all the circumstances and the available evidence, the action taken by the United States Government against terrorist-related targets in Libya was a lawful exercise of this inherent right of self-defence.

(Ibid., cols. 1025–6: 18 June 1986)

In reply to a question about fish conservation in the sea areas around the Falkland Islands, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

... it is, of course, a protection zone and not an exclusion zone that we are talking about, and only Argentine warships and military aircraft are excluded from the zone. It has always been possible for Argentine fishing vessels to enter it. They have had to ask permission to do so, but there is no reason for thinking that they would not be given that permission if they so wished. Peaceful activities by Soviet fishing vessels and Argentine fishing vessels pose no threat to the security of the islands. By definition, therefore, the actual crew is not a major consideration in this matter.

(Ibid., vol. 479, col. 718: 29 July 1986)

The Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, made the following written observations on 4 December 1986 in response to a petition dated 5 June 1986 from citizens in Harlow, Essex:

1. British Ministers have explained on numerous occasions in the House the background to Her Majesty's Government's decision to support the US action against Libya in April 1986.

2. In view of the history of Libyan sponsored terrorist activity over recent years, of the failure of peaceful measures in halting this, and of evidence that more terrorist activity was planned Ministers believed that the United States was fully entitled to take action to defend itself against further such attacks.

3. Her Majesty's Government regret that there were civilian casualties in the bombing on 15 April. Unfortunately it is not always possible to eliminate the risk of injury to innocent citizens in an action of self-defence. But that is not a reason for rejecting the concept of self-defence in the face of terrorist action which ruthlessly and deliberately sets out to injure and kill innocent people.

(Text provided by the Foreign and Commonwealth Office)

Part Fifteen: I. *Neutrality, non-belligerency—legal nature of neutrality*

At a press conference held by the Foreign and Commonwealth Office on 17 November 1986, the following statement was made:

Questioned about arms sales to Iran, Spokesman drew attention to what the Prime Minister had said in Washington on Saturday. This was:

‘I am not really going to add to what the President said. . . . He made his views absolutely clear. We too have diplomatic contacts with Iran. We recognise the importance of Iran as a country. We too would like to see the end of the Iranian–Iraq war; we too are neutral in that war and we pursue a policy of not delivering lethal weapons to either side.’

(Ibid.)

Part Fifteen: I. B. *Neutrality, non-belligerency—legal nature of neutrality—sea warfare*

On 24 February 1986, in the UN Security Council, the UK Permanent Representative to the UN in New York, Sir John Thomson, stated in the context of the Iran/Iraq conflict:

There continue to be attacks on the shipping of States that are not parties to the hostilities, contrary to international law, and interference with the freedom of navigation.

(S/PV. 2666, p. 22)

APPENDICES

I. MULTILATERAL AGREEMENTS SIGNED BY THE UNITED KINGDOM IN 1986¹

<i>Title</i>	<i>Place and Date</i>	<i>UK Signature</i>	<i>Text²</i>
Onchocerciasis Fund Agreement, 1979	Washington, 19.9.1979	1.5.1980 (accession)	Misc. No. 4 (1980) (Cmnd. 7815)
Protocol drawn up by the Diplomatic Conference convened with a view to bringing into force the Convention concerning International Carriage by Rail (COTIF) signed on 9.5.1980	Berne, 17.2.1984	17.2.1984	Not published
1984 Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973	London, 7.9.1984	7.1.1986 (entry into force)	Not yet published
Amendment of Article 16, paragraph 1, of the Statute of the International Institute for the Unification of Private Law of 15.3.1940	Rome, 9.11.1984	11.3.1985 (approval)	Not yet published
Decision of the Council of the European Communities on the Communities' System of Own Resources	Brussels, 7.5.1985	4.12.1985 (notification of adoption)	TS No. 12 (1987) (Cm. 88)
Protocol of Amendment to the Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences, Nairobi, 1977	Brussels, 13.6.1985	16.12.1985 (acceptance)	Not yet published
OSCOM Decision 85/1 concerning Annexes I and II to the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft 1972	Marichamn, 13.6.1985	12.3.1986 (approval)	Not yet published
Convention on the Law Applicable to Trusts and on their Recognition	The Hague, 1.7.1985	10.1.1986	Misc. No. 3 (1985) (Cmnd. 9494)
Convention establishing the Multilateral Investment Guarantee Agency	Seoul, 11.10.1985	9.4.1986	Not yet published
International Agreement on the Use of INMARSAT Ship Earth Stations within the Territorial Sea and Ports	London, 16.10.1985	16.6.1986	Not yet published
Amendments to the Convention on the International Maritime Satellite Organization (INMARSAT)	London, 16.10.1985	12.5.1986 (acceptance)	Not yet published

¹ Information supplied by the Foreign and Commonwealth Office. The table includes some agreements signed by the United Kingdom before 1986, where information was not previously available. The information is correct as at January 1987, although in some cases information available since that time has been included.

² Publication is in various series of UK Command Papers, namely: EC = European Communities Series; Misc. = Miscellaneous Series; TS = Treaty Series; Cmnd. or Cm. = Command Paper number.

<i>Title</i>	<i>Place and Date</i>	<i>UK Signature</i>	<i>Text</i>
Amendments to the Operating Agreement on the International Maritime Satellite Organization (INMARSAT)	London, 16.10.1985	12.5.1986 (approval)	Not yet published
Onchocerciasis Fund Agreement, 1986	Washington, 4.2.1986	4.2.1986	Not yet published
Single European Act	Luxembourg/The Hague, 17/18.2.1986	17.2.1986	EC No. 12 (1986) (Cmd. 9758)
European Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes (Council of Europe No. 123)	Strasbourg, 18.3.1986	18.3.1986	Misc. No. 4 (1986) (Cmd. 9884)
Protocol amending the Convention for the Prevention of Marine Pollution from Land-based Sources	Paris, 26.3.1986	26.3.1986	Misc. No. 3 (1987) (Cm. 87)
European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations	Strasbourg, 24.4.1986	24.4.1986	Misc. No. 5 (1986) (Cmd. 9885)
International Wheat Agreement, 1986, incorporating the Wheat Trade Convention, 1986, and the Food Aid Convention, 1986	New York, 1.5.-30.6.1986	26.6.1986	Misc. No. 3 (1986) (Cmd. 9793)
Agreement on the Rules governing the Transportation of Frozen and Deep Frozen Foodstuffs by Equipment with Thin Side Walls to and from Italy	Paris, 24.6.1986	10.10.1986	Not yet published
Agreement on the Reconstitution of the Commonwealth Agricultural Bureaux as CAB International	London, 8.7.1986	8.7.1986	Misc. No. 9 (1986) (Cm. 17)
International Cocoa Agreement, 1986	Geneva, 25.7.1986	30.9.1986	Misc. No. 6 (1986) (Cmd. 9905)
Convention on Early Notification of a Nuclear Accident	Vienna, 26.9.1986	26.9.1986	Not yet published
Convention on Assistance in the case of a Nuclear Accident or Radiological Emergency	Vienna, 26.9.1986	26.9.1986	Not yet published
Agreement between the Government of Ireland, the Government of the UK and the Government of the United States of America concerning the International Fund for Ireland	Washington, 26.9.1986	26.9.1986	TS No. 57 (1986) (Cmd. 9910)

II. BILATERAL AGREEMENTS SIGNED BY THE UNITED KINGDOM IN 1986¹

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text²</i>
ANGOLA General Co-operation Agreement	London, 14.5.1986	Angola No. 1 (1986) (Cmd. 9902)

¹ Information supplied by the Foreign and Commonwealth Office. The table includes some agreements signed by the United Kingdom before 1986, where information was not previously available. The information is correct as at January 1987, although in some cases information available since that time has been included.

² Publication is in various series of UK Command Papers, including Treaty Series (TS). Cmd. or Cm. = Command Paper number.

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
AUSTRALIA Exchange of Notes amending the Agreement to provide for the Establishment and Operation in Australia of a Large Optical Telescope, signed at Canberra on 25.9.1969 Agreement on Health Services Exchange of Notes further amending the Agreement on Social Security signed at Canberra on 29.1.1958	Canberra, 28.2.1986 London, 21.3.1986 London, 29/31.12.1986	TS No. 34 (1986) (Cmnd. 9828) TS No. 41 (1986) (Cmnd. 9870) Not yet published
BELGIUM Exchange of Notes amending the Agreement on the International Carriage of Goods by Road, signed at Brussels on 23.7.1970	Brussels, 25.7.1986	TS No. 67 (1986) (Cm. 61)
BELIZE Exchange of Notes concerning the Extension to the Turks and Caicos Islands of the Agreement for the Promotion and Protection of Investments, signed at Belmopan on 30.4.1982 Exchange of Notes concerning the Extension to the Cayman Islands of the Agreement for the Promotion and Protection of Investments, signed at Belmopan on 30.4.1982	Belmopan, 28.11/10.12.1985 Belmopan, 29.1/4.2.1986	TS No. 30 (1986) (Cmnd. 9787) TS No. 32 (1986) (Cmnd. 9812)
CENTRAL AFRICAN REPUBLIC Agreement on Certain Commercial Debts	Paris, 18.4.1986	TS No. 42 (1986) (Cmnd. 9874)
CHILE Agreement on Certain Commercial Debts	London, 29.4.1986	Not yet published
CHINA, PEOPLE'S REPUBLIC OF Agreement concerning the Promotion and Reciprocal Protection of Investments, with Exchanges of Notes [concerning Historical Claims and concerning Disputes to be submitted to the International Centre for the Settlement of Investment Disputes]	London, 15.5.1986	TS No. 33 (1986) (Cmnd. 9821)
Agreement concerning the Financial Arrangement relating to Development Loans	London, 15.5.1986	TS No. 39 (1986) (Cmnd. 9865)
COLOMBIA Exchange of Notes concerning the withdrawal by the Government of Colombia of their Notice of Termination, and the joint maintaining in force of the Agreement for Air Services between and beyond their respective Territories signed at Bogotá on 16.10.1947 (as amended)	Bogotá, 23/25.6.1986	TS No. 67 (1986) (Cm. 61)

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
COSTA RICA Agreement on Certain Commercial Debts	London, 30.1.1986	TS No. 37 (1986) (Cmnd. 9845)
CUBA Agreement on Certain Commercial Debts	London, 12.11.1986	TS No. 14 (1987) (Cm. 97)
ECUADOR Agreement on Certain Commercial Debts	London, 29.1.1986	Not yet published
FIJI Exchange of Notes amending the Overseas Service (Fiji) Agreement 1971/81 (Overseas Service (Fiji) Agreement 1971/86)	Suva, 20.3/23.6.1986	Not yet published
FINLAND Exchange of Notes amending the Agreement on International Road Transport signed at Helsinki on 8.4.1975	Helsinki, 18/27.12.1985	TS No. 4 (1987) (Cm. 58)
FRANCE Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link, with Exchange of Notes [concerning UK Legislation] and Exchange of Notes concerning the Provisional Application of Articles 10 and 11 of the Treaty	Canterbury, 12.2.1986	France No. 1 (1986) (Cmnd. 9745)
Protocol amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income signed at London on 22.5.1968, as amended by Protocols signed at London on 10.2.1971 and 14.5.1973	London, 12.6.1986	Not yet published
THE GAMBIA Exchange of Notes further amending the British Expatriates Supplementation (The Gambia) Agreement 1976/81 (The British Expatriates Supplementation (The Gambia) Agreement 1976/86)	Banjul, 18.8/13.10.1986	Not yet published
Exchange of Notes amending the Overseas Service (The Gambia) (Continuance) Agreement 1971/81	Banjul, 18.8/13.10.1986	Not yet published
INDIA Agreement concerning Public Officers' Pensions (Public Officers' Pensions (India) Agreement 1986)	New Delhi, 12.6.1986	Not yet published
IRELAND, REPUBLIC OF Agreement concerning the International Fund for Ireland	London/Dublin, 18.9.1986	Republic of Ireland No. 1 (1986) (Cmnd. 9908)

<i>Country and Title</i>	<i>Text</i>	<i>Place and Date</i>	<i>Text</i>
ITALY Extradition Treaty	Italy No. 1 (1986) (Cmnd. 9807)	Florence, 12.3.1986	
IVORY COAST Agreement on Certain Commercial Debts	Not yet published	Abidjan, 17.10.1986	
JAMAICA Agreement on Certain Commercial Debts	TS No. 35 (1986) (Cmnd. 9830)	London, 6.2.1986	
JORDAN Exchange of Notes concerning the Extension to Hong Kong of the Agreement for the Promotion and Protection of Investments signed at Amman on 10.10.1979	TS No. 18 (1987) (Cm. 121)	Amman, 10.4/14.5.1986	
Exchange of Notes amending the Agreement on the International Transport of Goods by Road signed on 2.2.1981	Not yet published	Amman, 10/20.8.1986	
KENYA Exchange of Notes concerning the Extension of the Overseas Service Aid (Kenya) Agreement 1971/81 (The Overseas Service Aid (Kenya) Agreement 1971/86)	Not yet published	Nairobi, 7.4/15.5.1986	
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Exchange of Notes further amending the Overseas Service (Malawi) Agreement 1971, as amended (The Overseas Service (Malawi) Agreement 1971/87)	Lilongwe, 24/27.9.1986	Not yet published
Exchange of Notes further amending the British Expatriates Supplementation (Malawi) Agreement 1971 as amended (The British Expatriates Supplementation (Malawi) Agreement 1971/87)	Lilongwe, 24/27.9.1986	Not yet published
MALTA		
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Agreement for the Promotion and Protection of Investments	Port Louis, 20.5.1986	TS No. 6 (1987) (Cm. 65)
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MOZAMBIQUE		
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Exchange of Notes amending the Agreement concerning the Programme Loan 1977	Maputo, 23/30.12.1986	Not yet published
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Agreement concerning Public Officers' Pensions (The Public Officers' Pensions (Pakistan) Agreement 1986)	Islamabad, 20.3.1986	TS No. 17 (1987) (Cm. 116)
Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains	Islamabad, 24.11.1986	Not yet published

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Agreement on Certain Commercial Debts	Manila, 4.2.1986	TS No. 44 (1986) (Cmnd. 9876)
POLAND Agreement in the form of an Exchange of Letters on Certain Commercial Debts (The UK/Poland Debt Agreement No. 3 (1985))	Warsaw, 7.8.1986	TS No. 15 (1987) (Cm. 105)
SINGAPORE Exchange of Notes concerning the Extension to the Turks and Caicos Islands of the Agreement for the Promotion and Protection of Investments of 22.7.1976	Singapore, 7.3.1986	TS No. 54 (1986) (Cmnd. 9898)
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Exchange of Notes further amending the Overseas Service Aid (Swaziland) Agreement 1976 (as amended 1981)	Mbabane, 31.3/4.4.1986	Not yet published
SWITZERLAND Exchange of Notes further amending the Route Schedules annexed to the Agreement for Air Services between and beyond their respective Territories of 5.4.1950	London, 14.7/15.8.1986	TS No. 7 (1987) (Cm. 68)
TANZANIA Exchange of Notes amending the British Expatriates Supplementation (Tanzania) Agreement 1981 (British Expatriates Supplementation (Tanzania) Agreement 1981/7)	Dar es Salaam, 13.11.1986	Not yet published
THAILAND Exchange of Notes extending to the Turks and Caicos Islands the Agreement for the Promotion and Protection of Investments signed in London on 28.11.1978 as extended	Bangkok, 23.4/22.8.1986	Not yet published

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
THAILAND (<i>cont.</i>)		
Exchange of Notes further amending the Route Schedule annexed to the Air Services Agreement signed at Bangkok on 10.11.1950	Bangkok, 29.8/1.10.1986	TS No. 11 (1987) (Cm. 86)
TONGA		
Exchange of Notes extending the Overseas Service (Tonga) Agreement 1971/81 (Overseas Service (Tonga) Agreement 1971/86)	Nuku'alofa, 27.3/27.5.1986	TS No. 67 (1986) (Cm. 61)
TRINIDAD AND TOBAGO		
Agreement concerning Public Officers' Pensions (The Public Officers' Pensions (Trinidad and Tobago) Agreement 1986)	Port-of-Spain, 29.7.1986	TS No. 63 (1986) (Cm. 22)
TURKEY		
Exchange of Notes amending the UK/Turkey (Gemlik Ammonia Plant) Loan Agreement 1976	Ankara, 24.10/20.12.1985	TS No. 31 (1986) (Cmnd. 9796)
Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains	London, 19.2.1986	Not yet published
TUVALU		
Exchange of Notes amending and extending the Overseas Service Aid (Tuvalu) Agreement 1981 (Overseas Service Aid (Tuvalu) Agreement 1981/6)	Suva/Funafuti, 20/26.3.1986	TS No. 46 (1986) (Cmnd. 9880)
USSR		
Exchange of Notes renewing and amending the Agreement on Co-operation in the Field of Medicine and Public Health signed at Moscow on 17.2.1975	Moscow, 25.11.1985/8.1.1986	TS No. 56 (1986) (Cmnd. 9899)
Agreement concerning the Settlement of Mutual Financial and Property Claims arising before 1939	London, 15.7.1986	TS No. 65 (1986) (Cm. 30)
Agreement concerning the Prevention of Incidents at Sea beyond the Territorial Sea	London, 15.7.1986	TS No. 5 (1987) (Cm. 57)
Additional Protocol to the Treaty on Merchant Navigation signed at London on 3.4.1968	Moscow, 30.12.1986	Not yet published
UNITED STATES OF AMERICA		
Two Exchanges of Notes extending the Agreement in the form of an Exchange of Letters concerning the Cayman Islands and Matters connected with, arising from, related to, or resulting from any Narcotics Activity referred to in the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961, signed at London on 26.7.1984	Washington, 29.11.1985 and 28.5.1986	TS No. 67 (1986) (Cm. 61)
Treaty concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters	Grand Cayman, 3.7.1986	US No. 2 (1986) (Cmnd. 9862)

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
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VANUATU		
Exchange of Letters amending the Overseas Service Aid (Vanuatu) Agreement 1981 (Overseas Service Aid (Vanuatu) Agreement 1981/6)	Port Vila, 21/25.3.1986	TS No. 64 (1986) (Cm. 23)
YUGOSLAVIA		
Agreement on Certain Commercial Debts falling due between 1.1.1985 and 15.5.1986	Belgrade, 7.2.1986	TS No. 60 (1986) (Cm. 13)
ZAIRE		
Agreement on Certain Commercial Debts	London, 7.7.1986	Not yet published
ZAMBIA		
Exchange of Notes in the form of an Agreement amending the Overseas Service (Zambia) Agreement 1981 (Overseas Service (Zambia) (Continuance) Agreement 1981/6)	Lusaka, 27.3.1986	TS No. 67 (1986) (Cm. 61)
Exchange of Notes in the form of an Agreement amending the British Expatriates Supplementation (Zambia) Agreement 1981 (British Expatriates Supplementation (Zambia) (Continuance) Agreement 1981/6)	Lusaka, 27.3.1986	Not yet published

III. UNITED KINGDOM LEGISLATION DURING 1986 CONCERNING MATTERS OF INTERNATIONAL LAW¹

The Australia Act (1986 c. 2) terminates the power of the Parliament of the United Kingdom to legislate for Australia. It makes provision for the legislative powers of the Parliaments of the States of the Commonwealth of Australia and for the powers and functions of Her Majesty and of Governors in respect of States. It terminates the responsibility of Her Majesty's Government in the UK in relation to State matters, and terminates appeals to Her Majesty in Council from Australian courts. (See Part Three: I. A. 1., above.)

The European Communities (Amendment) Act (1986 c. 58) amends the European Communities Act 1972 so as to include in the definition of 'the Treaties' and 'the Community Treaties' certain provisions of the Single European Act signed at Luxembourg and The Hague on 17 and 28 February 1986, and so as to extend certain provisions relating to the European Court to any court attached thereto. It amends references to the European Assembly in enactments and instruments so as to read 'European Parliament', and approves the single European Act. (See Part One: II. D., above.)

The Family Law Act (1986 c. 55), *inter alia*, makes further provision as to the imposition, effect and enforcement of restrictions on removal of children from the UK, and amends the law relating to the recognition of divorces, annulments and legal separations.

The Outer Space Act (1986 c. 38) confers licensing, registration and other powers on the Secretary of State to secure compliance with the international obligations of the UK with regard to the launching and operation of space objects and the carrying on of other activities in outer space by persons connected with the UK.

The Protection of Military Remains Act (1986 c. 35) secures protection from unauthorized interference of the remains of military aircraft and vessels that have crashed, sunk or been stranded and of associated human remains. It provides for extraterritorial jurisdiction in certain circumstances over offences created by the Act. (See Part Seven: II. C., above.)

¹ Compiled by C. A. Hopkins.

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